United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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76-1083

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

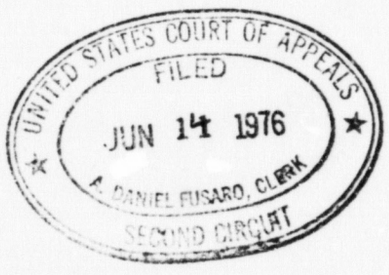
JAMES M. HENDRIX,

Defendant-Appellant.

Docket No. 76-1083

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether it was reversible error to instruct the jury to consider the "presumption of sanity" in deciding whether the Government had met its burden of proving that Hendrix was sane at the time of the crime.

2. Whether the refusal to grant the defense request to charge the jury on the lesser-included offense of involuntary manslaughter is error mandating reversal.

3. Whether the failure to exercise discretion in granting Hendrix' request for an instruction directing the jury that a verdict could be brought in finding Hendrix not guilty by reason of insanity was error mandating reversal.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable Mark A. Costantino) rendered February 20, 1976, after a jury trial, convicting appellant James Hendrix of second degree murder, in violation of 18 U.S.C. §1111. Hendrix was sentenced to a term of nine years in prison with a direction that he receive psychiatric care.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. Introduction and Background

Late on the night of December 29, 1974, Robert Kiedinger was found dead in his cabin (193-194[1]) aboard the American ship,

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[1] Numerals in parentheses refer to pages of the transcript of appellant Hendrix' second trial, the first trial having resulted in a mistrial because of the jury's failure to reach a verdict. Since all motions made in the first trial, also befor Judge Costantino, were specifically incorporated into the second trial (5, 544), references to those motions will be denoted by numerals referring to the transcript dated July 1-11, 1975.

S.S. Eagle Voyager,[2] which was then docked in the Russian port city of Odessa, on the Black Sea (169). The coroner's examination established that Kiedinger died as a result of asphyxiation by manual strangulation and that the body exhibited multiple abrasions, contusions, and lacerations (503). Appellant Hendrix was charged with murder in the second degree, in violation of 18 U.S.C. §1111.[3]

Hendrix and Kiedinger were both crewmen aboard the Eagle Voyager (165-168). The Government's theory of the case was that Hendrix, whose job it was to clean the officers' cabins, killed Kiedinger, his supervisor, as a result of friction arising from Kiedinger's evaluation of Hendrix' work. The defense to the charge was that Hendrix was insane when he assaulted Kiedinger and was therefore not legally responsible for the death.

To establish an animosity between Hendrix and Kiedinger, the Government relied on two incidents which occurred during the voyage from the United States to Russia. The first of these episodes occurred as the crew was returning from shore leave at Gibraltar. According to the testimony of the other crewmen present, Hendrix called Kiedinger either a "mother

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[2]The S.S. Eagle Voyager, owned by the Sea Transport Corporation, a Delaware corporation, had been chartered to transport wheat from the United States to the Soviet Union (160-163).

[3]The indictment is B to the separate appendix to appellant's brief.

fucking [or bald-headed] baby [illegible]er"[4] (281, 585), or simply a "pervert" (453). Significantly, what this testimony also makes clear is that when Hendrix was chastised for the remark, he acknowledged that he was wrong (453) and apologized to Kiedinger[5] (286, 300, 362).

The second incident occurred after the ship docked at Odessa and Hendrix was "logged"[6] as a result of Kiedinger's report to the ship's master that Hendrix had gone ashore when he was supposed to be on [illegible] (447, 521). Although Hendrix, according to this evidence, was concerned and upset about the logging, he was reassured by senior officers, as well as by his peers, that there was nothing to worry about since, in all probability, the logging would be lifted before the end of the voyage[7] (329-330, 449, 482-484).

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[4]Henry Manning, the third cook on the Eagle Voyager, testified that Hendrix, who was then 22 years old, had confided in him that Kiedinger, who was 50, had made sexual advances toward him (591).

[5]Raul Giron, a crew messman, who admitted disliking Hendrix (321-322), asserted that he heard Hendrix threaten to "get" Kiedinger (319). However, none of the other crewmen present heard such a threat (301, 362, 485).

[6]"Logging" is the entry of a negative report in the ship's log which can result, if the entry is not removed before the end of the voyage, in a $50 fine (331, 447).

[7]Even if the entry was not removed, the loss to Hendrix was to be no more than $50 of the more than $1,000 he would be paid for the voyage (332).

B. Events of December 29, 1974

At approximately 10:00 a.m. on December 29, 1974, Hendrix asked Kiedinger when he met him in the mess hall if Kiedinger still had the gun he had purchased in Russia (172). Kiedinger responded that he had given it to the captain for safekeeping, and added that since he did not have any shells, Hendrix did not have to worry about Kiedinger's shooting him (173). According to General Hearne, Kiedinger had earlier been heard to say that the master had demanded the gun because he feared Kiedinger would use it on Hendrix[8] (372).

After spending a portion of the day[9] on leave, Hendrix returned to the ship at approximately 9:00 p.m., and announced to some members of the crew that he was "going to stop acting like a lamb and start acting like a lion" (271). According to these shipmates, Hendrix was then either "intoxicated" or "on his way to getting there" (271, 309, 346, 402).

Hendrix testified that during the course of that day he had consumed some champagne and Scotch and had smoked some

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[8]Although Hendrix had no memory of asking Kiedinger about the location of the gun, he did remember that some time earlier Kiedinger had threatened to shoot him (645).

[9]Hendrix testified that he spent his shore leave with his Russian "girl friend" and her family (

hashish[10] (638). He then decided to go to Kiedinger's cabin to re-establish their once good relationship (640). He knocked on the door and Kiedinger let him in (641). According to Hendrix, Kiedinger placed himself between Hendrix and the door, took Hendrix by the arm, "looked at my behind, and said he was going to fuck me" (642). In response, Hendrix knocked Kiedinger down and began kicking him (643). While Hendrix remembered that he turned his back to Kiedinger and that he kicked him with the heel of his boots, he could not remember what happened next. In fact, his memory of the period between the kicking and the time he was handcuffed and taken to the officers' lounge is non-existent (643-644).

That period and what followed immediately thereafter was testified to by several crew members. When Kiedinger's body was discovered, no weapons or dangerous instruments were found in the cabin (225), and the Government did not contend that any had been used to kill Kiedinger.

Gary Carter related how, about midnight, Hendrix pounded on the door of Carter's cabin, entered the room, pushed Carter's roommate aside, and began "hollering" and "mumbling" about having killed somebody (349-350). He also said that the steward

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[10]Hendrix remembered leaving his remaining supply of hashish on his bed( ). John Elklen, the chief engineer, who searched Hendrix' cabin, testified that hashish was found behind the light switch (428).

(Kiedinger) wouldn't mess with anybody any more. He asked Carter to help him hide his clothes out, after taking off his pants, for no stated reason he put them back on again (351). According to Carter, everything Hendrix said was "mumblish" (352).

When Hendrix left Carter's cabin, he met Daniel Minnier whom he cautioned, despite the innocuousness of the encounter, "not to say a mother fucking word" (278). Minnier then watched Hendrix proceed to his own cabin[11] (290-292). Shortly thereafter Hendrix emerged wearing the same clothes and continued on to Henry Manning's cabin. Manning testified that Hendrix came into his room and announced that he had killed Kiedinger and thrown the body overboard[12] (590). He also told Manning that he knew what he had done and that it was wrong (597).

While he was in Manning's cabin Hendrix was taken into custody and handcuffed (457). At that time he was still wearing the jeans, bloodsoaked from his knees to his ankles, and bloodsoaked socks[13] (194, 278, 326, 350, 382, 458). Despite his incriminating attire, when confronted with the accusation

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[11]According to Minnier, the cabin was equipped with portholes which overlooked the water (291).

[12]This, of course, was untrue: Kiedinger's body was found in his own cabin (457).

[13]Hendrix' boots were found in plain view in a fire station recess located near his room (405).

that he had killed Kiedinger, Hendrix denied that he had anything to do with the killing (198, 327, 378, 405). According to Raul Giron, Hendris was "crawling and screaming, saying he didn't kill nobody." He called his accusers "liars." He was "wild" (327, 343).

Dill Bellinger, the chief mate, who spent the next five hours with Hendrix in the officers' lounge, revealed that during that time Hendrix talked continuously. Again Hendrix denied killing Kiedinger, but this time offered to reveal who actually did do it (528). He also said, "The steward deserved to die" and "When you fight, you fight to kill." Then he worried about his new Russian girl friend, about ending up in Siberia, or being hanged (462). After awhile he decided he wanted to write a letter. He then spent considerable time fitfully starting, then crumbling up and discarding, one piece of stationery after another (463). At one time Hendrix asked Bellinger whether he thought he, Hendrix, was guilty (464). The next day Hendrix asked Arlen Jones where Kiedinger was and if he was alive (406).

In a report made immediately after the incident, General Hearnes described Hendrix' conduct after the crime as follows:

> ... Changing from one mood to the other, such as confidence, fear, vindictiveness, helplessness, and the playing of at least one ethnic role, ... he lacked coordination, and his speech was slurred.
>
> (399).

Other adjectives the crew attributed to Hendrix' conduct both

before and after the crime were "strange" (304), "crazy" (342), "agitated" (403), "mixed up" (407), "maniac" (493), and "irrational" (496).

C. Evidence Relating to Hendrix' Insanity at the Time of the Crime

Hendrix, who at the time of trial was 23 years old, testified as to his prior history. Both his mother, whom he had never seen, and his brother had been treated psychiatrically (604). As a seven year-old child, Hendrix had an emotional bed wetting problem for which he was punished by being made to wear a diaper and walk around the block (606). When his father punished him, he made him stand in the corner on his toes; then his father would strike him and call him a Nazi spy [illegible]. At the age of nine or ten, Hendrix slit his wrists because he got a bad report card[14] (624).

Hendrix related how, in 1969, while incarcerated in a Houston, Texas, jail awaiting trial on a marijuana charge,[15] he was raped and sodomized (618) and stabbed with a sharpened spoon (619).

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[14] Since that time he had twice more -- on August 26 and September 6, 1975 -- tried to commit suicide by cutting his wrists (624).

[15] Hendrix was acquitted of these charges (617).

Two years later Hendrix was hospitalized for ten days for psychiatric treatment. This occurred at the Seventh Day Adventist Hospital in Karachi, West Pakistan, where Hendrix had sailed as a crewman on a ship known as the Jefferson Davis (608). At the time, Hendrix was delusional and hallucinating, and was diagnosed as psychotic and suffering from a paranoid reaction (727).[16]

The cause of this 1971 hospitalization was Hendrix' physical attack on a fellow crewman aboard the Jefferson Davis whom Hendrix believed was the devil.

Hendrix' behavior at that time and the incident aboard the Jefferson Davis were described by four other crewmen.[17] They said that prior to the attack Hendrix had expressed the belief that the devil was on the ship, in particular, lurking in the engine room (564, 566, 567). On one occasion Hendrix put black marks on a shipmate to encourage him to avoid the devil; on another occasion, in a state of "obvious agitation," Hendrix fled the engine room to escape the devil (564). When Hendrix launched

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[16]During his hospitalization, Hendrix had special duty nurses and was medicated with 600 miligrams of thorazine (723-730).

[17]This evidence appears in four 1971 letters which were introduced pursuant to a stipulation that if these witnesses were to testify they would assert the same facts set forth in the letters (561-567).

his unprovoked attack on Steve Malone, he kept calling Malone the devil (567).[18]

Prior to the fatal attack on Robert Kiedinger, Hendrix' behavior, as described by Henry Manning, was suspiciously bizarre. Manning recounted how he had observed Hendrix walking on deck late at night reciting or shouting insulting poems he had made up about people on the ship. When Manning later confronted Hendrix with this behavior, Hendrix denied having behaved in such a manner (579-583).

Dr. Augustus Kinzel, a psychiatrist and certified psychoanalyst with degrees from Yale, Pennsylvania, and Columbia Universities and training experience at Boston City Hospital and Columbia Presbyterian Hospital, where he was chief resident in psychiatry, testified for the defense. Prior to accepting his current position on the faculty of Physicians and Surgeons Medical School of Columbia University, Dr. Kinzel worked as a staff psychiatrist at the U.S. Medical Center for Federal Prisoners in Springfield, Missouri. He is a specialist in the causes of violent behavior (709-715).

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[18]Between this episode and the events on the Eagle Voyager, Hendrix was involved in at least two incidents -- one aboard the S.S. Arthur Middleton (653, 851), the other aboard the S.S. Trans Oregon (849).

While Dr. Kinzel did not examine Hendrix until August 1975 (792),[19] a report from the U.S. Medical Center at Springfield dated February 26, 1975 -- less than two months after the crime -- diagnosed Hendrix as suffering from "chronic undifferentiated schizophrenia" (756).[20] Similarly, an April 7, 1975, notation on the medical records of the Metropolitan Correctional Center in New York City explains that Hendrix' "persistent auditory hallucinations" -- according to Dr. Kinzel, a typical sign of schizophrenia (751) -- required that he be medicated with a daily dosage of 600 miligrams of thorazine (750-751).

Dr. Kinzel testified that when Hendrix attacked Kiedinger he was

> ... so mentally ill that he was able to lack substantial capacity to know the wrongfulness to know what he was doing and to conform his conduct to the requirements of the law.
>
> ... [H]e was undergoing a mental breakdown before the time of this occurrence and when this occurred he acted according to delusions rather than according to any rational

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[19] In the interim between Hendrix' arrival from Russia and the examination, there had been the first trial, at which another psychiatrist, Dr. Irwin Perr, who examined Hendrix on April 1, 1975, had testified that Hendrix was legally insane at the time of the assault on Kiedinger (Transcript of July 5, 1975, at 659, 674-698).

[20] While the purpose of the Springfield examination was to determine Hendrix' competence to stand trial, Dr. Kinzel explained that from his experience at Springfield he knew that the examination was complete and would encompass the patient's past history (755).

> reasons for wanting to harm someone. The basic delusion that he was acting under was that there was an evil, some kind of evil bizarre force that he felt was in others not simply the victim; then at the time of the offense he had the distinct feeling this evil force was in the victim; that his behavior from that point on was that he felt he was doing right by stomping out this evil force. This gave me the impression that he was acting psychotically; that is, acting according to a very odd belief that was a product of his mental illness.
>
> (756-757).

On distinguishing between a "personality disorder" and a "mental disease," and explaining how he concluded that Hendrix was suffering from the latter, Dr. Kinzel testified:

> A personality disorder is quite different from a mental illness where someone has a mental breakdown. A personality disorder [is a] trait in one's personality that brings him into a lot of difficulty with other people that creates a lot of friction that creates a lot of -- very often -- trouble with authority, that kind of thing; chronic traits don't involve a breakdown of the personality. They are just there and usually are there since childhood. It's quite different from a mental breakdown.
>
> * * *
>
> ... I think there are some features that [Hendrix] shows in his behavior of the personality disorder, but there were so many psychotic symptoms that he's had that it would make one feel that -- feel at least he had an underlying mental disorder, mental illness. Again, the psychotic symptoms, the hallucinations, the agitated move, the emotions, ranging all the way from laughing at inappropriate times to outbursts of rage, sullen or no emotional states, the thoughts that skip one from the other so there is no logical connection between them; behavior which is consistently inconsistent; that

> the individual star to do A, stops, starts to do B and stops, and goes back and does A again, can't do anything consistently, these are all signs of a psychotic mental illness, not signs of personality disorder.
>
> (763-764).

As to the descriptions of Hendrix' conduct at the time of the crime, Dr. Kinzel found significantly probative of a mental breakdown Hendrix' utter inability to change and hide his incriminating clothing, to recount a consistent story -- first admitting and then denying the killing (772, 774), his generally "agitated" condition (765-767). Also probative of this mental breakdown were Hendrix' delusional belief that he had thrown Kiedinger's body overboard (775), his confusion the day after the crime when he asked if Kiedinger was alive (769), and his earlier hostile poetry (770-771). Of particular significance, according to Dr. Kinzel, was the inconsistent emotional state described by General Hearnes. Of this behavior, Dr. Kinzel testified:

> There is no consistent emotional state in a person. Most of us walk aroung with a reasonabl[y] positive consistent mood. Someone who is having a mental breakdown will go from a high to a low, to an angry feeling, or sad feeling, and they go very quickly without anything in reality prompting them, that is their contact with reality when this is happening.
>
> (772).

Of Hendrix' comment to Bellinger that "Kiedinger deserved to die," Dr. Kinzel explained:

> ... I would think that at this point he would be trying to make sense out of what he did. And my impression would be, as it was when I was interviewing him, that he was trying to make it seem as if it was a rational act, that the steward deserved to die and when you are fighting you should kill, in other words, you should be tough. A reasonable thing rather than an irrational act.
>
> (773-774).[21]

As to Hendrix' alleged inquiry of Kiedinger if the latter still had his gun, Dr. Kinzel candidly testified:

> ... I would have to know what frame of mind he was in, whether he was asked did he still have a gun that he might kill with, or did he still have a gun as a matter of interest, or did he still have a gun and he says I want to kill him. There would be no way to evaluate that unless I know what was going on in his mind, unless I know what prompted him to ask the question.
>
> (785).

In contrast, the Government's psychiatrist, Dr. David Abrahamsen,[22] who testified to Hendrix' competence at the time of the crime (873), speculatively analyzed this same fact as follows:

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[21]This attempt at rationalization, Dr. Kinzel found, was similar to Hendrix' attempt during the psychiatric examination to present his conduct as rational behavior, and was a factor in the doctor's conclusion that Hendrix was not malingering (760).

[22]Dr. Abrahamsen attended the medical school of Oslo University and took courses in psychiatry at St. Elizabeth's Hospital, at Diagnostic Depot, at Illinois Penitentiary, Bellevue Hospital, and the Meninger Clinic (864).

> It might very well mean that the defendant wanted to be sure that the deceased didn't have a gun in case the defendant was going to do something to him, and possibly might be hurt himself if he did something to the deceased. This is the only explanation I can find.
>
> (877).[23]

Inferences patently outside the scope of psychiatric expertise characterized much of Dr. Abrahamsen's testimony. For example, of Hendrix' fleeting attempt to change his clothes, Abrahamsen definitively asserted:

> When a man says that he would like to get rid of his boots and pants, it really means that he would like to hide the alleged crime which may have been committed. He is very much aware of the situation that he has done something wrong and is trying to get away from it.
>
> (874-875).

Similarly, of Hendrix' inconsistent denials of guilt to certain members of the Eagle Voyager crew, Abrahamsen contended, without support in the record:

> It might very well be that he possibly was afraid of authority, you see, which these officers represented and possibly also was afraid of any punishment he might get.
>
> (876; see also 877-875).

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[23] Abrahamsen did not examine appellant until May 29, 1975.

In his charge to the jurors,[24] Judge Costantino, over defense objection, refused to instruct on the lesser-included offenses of both voluntary and involuntary manslaughter (Transcript of July , 1975, at 756, 873-875). On the issue of Hendrix' insanity at the time of the crime, the District Judge instructed the jurors to consider the presumption of sanity in determining whether Hendrix was sane:

> You are not bound by the opinions of either expert or lay witnesses. You should not arbitrarily or capriciously reject the testimony of any wintess, but you should consider the testimony of each witness in connection with the other evidence in the case, and give it such weight as you believe it is fairly entitled to receive.
>
> You may also consider that every man is presumed to be sane, that is, to be without mental disease, and to be responsible for his acts. A presumption may, however, be overcome by evidence. You should consider these principles in the light of all the evidence in the case, and give them such weight as you believe they are fairly entitled to receive.
>
> (1014-1015).

Over strenuous defense objection, and contrary to the ruling made in the first trial, Judge Costantino refused to present the jury with the alternative of a trifurcated verdict of (1) guilty, (2) not guilty, or (3) not guilty by reason of insanity.

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[24] The complete charge is C to the separate appendix to appellant's brief.

The Judge declined so to charge, as requested, despite his inclination to do so, because he mistakenly believed that this Court had precluded the trifurcated charge (944-945).

After deliberations, the jury returned a verdict of guilty. Hendrix was sentenced[24] to a period of nine years in prison with a specific direction that he receive psychiatric treatment.

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[24]Hendrix' "statement" to the court prior to the imposition of sentence is D to the separate appendix to appellant's brief.

ARGUMENT

Point I

IT WAS REVERSIBLE ERROR TO INSTRUCT THE JURY TO CONSIDER THE "PRESUMPTION OF SANITY" IN DECIDING WHETHER THE GOVERNMENT HAD MET ITS BURDEN OF PROVING THAT HENDRIX WAS SANE AT THE TIME OF THE CRIME.

The defense to the murder charge was that Hendrix was insane at the time of the crime. The substantial evidence as to Hendrix' mental illness and his lack of responsibility for the crime squarely placed his sanity in issue and required, as Judge Costantino indeed found, that the Government had to establish Hendrix' sanity beyond a reasonable doubt.

Despite this posture of the case, and in direct contradiction to his own finding that sanity was at issue, Judge Costantino, in his charge, improperly (1) informed the jurors of the existence of the presumption of sanity, (2) allowed them to redetermine whether the presumption had been overcome, and (3) directed the jurors that the presumption nonetheless remained evidence which eased the Government's burden of proof. Specifically, he instructed:

> You may also consider that every man is presumed to be sane, that is, to be without mental disease, and to be responsible for his acts. A presumption may, however, be overcome by evidence. You should consider these principles in light

> of all the evidence in the case, and give them such weight as you believe they are fairly entitled to receive.
>
> (1015). Emphasis added.

This instruction reveals a fundamental misapprehension of the law[25] which, in the context of this case, made impossible a proper evaluation by the jury of the insanity defense. At the time the case was submitted to the jury there was no conceivable or justifiable reason for telling the jury about the presumption, for the presumption was no longer in the case.

The presumption of sanity is a "legal" presumption. United States v. Lawrence, 480 F.2d 688, 692 (5th Cir. 1973); Wigmore, ON EVIDENCE, §§2490, 2491 (3d ed. 1940). It functions only as the mechanism by which to impose upon a defendant the initial burden of coming forward with some evidence of insanity. United States v. Lawrence, supra; Wigmore, ON EVIDENCE, supra. Once sufficient evidence has been presented, the presumption of sanity simply disappears from the case. United States v. Bohle, 445 F.2d 54, 70 (7th Cir. 1971); United States v. Skinner, 437 F.2d 164, 166 (5th Cir. 1971); United States v. Ingman, 426 F.2d 973, 976 (9th Cir. 1970); Blake v. United States, 407 F.2d 908 (5th Cir. 1969); Brook

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[25] While counsel did not object to the charge as given by the the Court, the error was so substantial as to deprive Hendrix of a fair trial. United States v. Skinner, 437 F.2d 164, 166-167 (5th Cir. 1971).

v. United States, 387 F.2d 254, 257 (5th Cir. 1967); Davis v. United States, 364 F.2d 572, 574 (10th Cir. 1966).

In this case, where there is no dispute that substantial evidence of insanity put sanity in issue, Judge Costantino erred in the first instance by telling the jurors about the presumption, and then compounded the error by the instruction that the presumption remained a viable piece of evidence to be considered in the determination of sanity. This direction was wrong because the presumption contains no probative force, and therefore cannot add any weight to the facts upon which the prosecution may rely. Wigmore, ON EVIDENCE, supra, §2491(3).

In United States v. Lawrence, supra, 480 F.2d at 692, the Court of Appeals for the Fifth Circuit cogently explained the proper operation of the presumption as follows:

> The presumption of sanity has been described as "a rule stating that the defendant has the burden of producing evidence of his insanity at the time of the offense." C. McCormack, EVIDENCE (2d ed.) §346 (1972). The presumption of sanity is not an intangible bit of substantive evidence inuring to the prosecution's benefit but is "simply a convenient aid to rational determination ... based on the common experience of mankind that the overwhelming majority of us, regardless of our differences, quirks and peculiarities, are of sufficient mental responsibility that we meet the test of criminal responsibility ... [and] not to be deified into something else by formalistic application to a situation totally foreign to its purpose." Hackworth v. United States, 380 F.2d 19, 21 (5th Cir. 1967).

The plain meaning of the words "presumption of sanity" necessarily conveyed to the jurors the erroneous belief that the starting point of their analysis was the assumption that Hendrix was sane. From there, it was only logical that the jurors would understand that they had to find he was sane unless the evidence of insanity overcame the force of the presumption. Therefore, it is clear that, despite the correct instruction on the Government's burden of proof, this challenged portion of the charge had the effect of placing the burden of proof on Hendrix. Also, of necessity, it inspired an inappropriate skepticism of the validity of the psychiatric evidence of insanity, which now unfairly had to be weighed against the presumption that all people are sane.

The impact of this charge on the jury must have been great, for a conviction resulted notwithstanding the extraordinarily strong evidence of insanity and the inappropriate nature of the Government's evidence in response.

As a preliminary matter, even the Government's theory of the background and motivation for the crime indicate that Hendrix was mentally ill. The animosity between him and Kiedinger over the criticism of Hendrix' work was hardly rational justification for such a violent reaction. This is particularly true in light of the fact that the "logging" which supposedly triggered the fatal confrontation, was known to Hendrix to be little more than a formality.

The facts of the crime and Hendrix' behavior immediately thereafter are further evidence of his mental instability. His behavior was completely erratic,

> ... [c]hanging from one mood to the other, such as confidence, fear, vindictiveness, helplessness, and the playing of at least one ethnic role, ... he lacked coordination and his speech was slurred.
>
> (399).

He was unable, despite his stated intention and ample opportunity, to change and hide his incriminating clothing. At first he acknowledged what he had done, but when confronted with the deed and his bloodstained clothing, denied having anything to do with the killing.

The crewmen on board the ship described Hendrix' behavior as "strange," "crazy," "agitated," "mixed up," "manic," and

"irrational."

These characterizations are not surprising since Hendrix had a history of serious mental illness. A violent episode aboard the S.S. Jefferson Davis in 1971 produced a period of hospitalization when he was diagnosed as psychotic and suffering from paranoid reaction.

Upon his return from the Soviet Union, Hendrix was sent to the U.S. Medical Center in Springfield, Missouri, where his condition was diagnosed as "chronic undifferentiated schizophrenia." Records of the Metropolitan Correctional Center, where Hendrix was incarcerated pending trial, reveal that he suffered from persistent auditory hallucinations -- a typical sign of schizophrenia. At trial, Dr. Kinzel, the psychiatrist who testified for the defense, asserted that when Hendrix attacked Kiedinger he was undergoing a major mental breakdown and was acting

> ... according to delusions rather than according to any rational reasons for wan wanting to harm someone. The basic delusion that he was acting under was that there was an evil, some kind of evil bizarre force that he felt was in others not simply the victim; then at the time of the offense he had the distinct feeling this evil force was in the victim; that his behavior from that point on was that he felt he was doing right by stomping out this evil force. This gave me the impression that he was acting psychotically; that is, acting according to a very odd belief that was a product of his mental illness.
>
> (756-757).

See also appellant's statement at the time of sentence, D to the separate appendix to appellant's brief.

To counter this mass of evidence of insanity, the Government offered the testimony of Dr. Abrahamsen, who testified assuming that Hendrix was sane and interpreting Hendrix' actions in light of normal behavior patterns. Further, Abrahamsen's testimony was given as fact rather than as opinion. His testimony was totally inappropriate because it stated as factual conclusion what the jury was supposed to determine. Any questions the jury may have held as to the psychiatric validity of Dr. Abrahamsen's testimony were likely laid to rest by the District Court's charge on the presumption of sanity which advised the jurors that Hendrix was indeed to be considered sane and his conduct viewed as the behavior of a normal person.

Because the charge on the presumption of sanity improperly weighted the evidence in the Government's favor, and therefore eased the Government's burden of proof on this issue, the conviction must be reversed.

Point II

THE REFUSAL TO GRANT THE DEFENSE REQUEST TO CHARGE THE JURY ON THE LESSER-INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER IS ERROR MANDATING REVERSAL.

Defense counsel requested that the jury be charged on the lesser-included offenses of voluntary and involuntary manslaughter.[26] The Federal statute governing both these lesser crimes provides:

> §1112. Manslaughter
>
> (a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
>
> Voluntary -- Upon a sudden quarrel or heat of passion.
>
> Involuntary -- In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.
>
> (b) Within the special maritime and territorial jurisdiction of the United States,
>
> Whoever is guilty of voluntary manslaughter, shall be imprisoned not more than ten years;
>
> Whoever is guilty of involuntary manslaughter, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

---

[26] Defense counsel's request made during the first trial was incorporated by reference as his request for the charge in the second trial.

Counsel argued that the involuntary manslaughter charge was appropriate[27] because one view of the evidence supported a finding that Kiedinger died during an assault by "striking, beating, or wounding," a misdemeanor offense under 18 U.S.C. §113(d).[28] That statute provides:

> §113. Assaults within maritime and territorial jurisdiction
>
> Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:
>
> ...
>
> (d) Assault by striking, beating, or wounding, by fine of not more than $500 or imprisonment for not more than six months, or both.

---

[27]The prosecutor agreed that Hendrix was entitled to a charge on voluntary manslaughter (Transcript dated July 9, 1975, at 874).

[28]Title 18 U.S.C. §1 provides:

> §1. Offenses classified
>
> Notwithstanding any Act of Congress to the contrary:
>
> (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
>
> (2) Any other offense is a misdemeanor.
>
> (3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

Thus, if a simple assault produced a death, the highest degree of crime would be involuntary manslaughter.

Judge Costantino rejected this argument and refused to give the involuntary manslaughter instruction.[29] He held that Hendrix' assault on Kiedinger was not a simple assault because the boots involved were a "dangerous weapon' which, under §113(c),[30] made the assault a felony.

Alternatively, he held that the fact of the strangling somehow precluded a finding of involuntary manslaughter (Transcript of July 9, 1975, at 874-875). This ruling was error mandating reversal.

---

[29]The District Judge's having denied the instruction on involuntary manslaughter, counsel declined to accept a lesser-included charge on voluntary manslaughter on the theory that to do so would encourage the jury to compromise (Transcript of July 9, 1975, at 874, 875).

[30]Title 18 U.S.C. §113(c) provides:

> Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:
>
> ...
>
> (c) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by fine of not more than $1,000 or imprisonment for not more than five years, or both.

There can be no dispute that, as a legal matter, manslaughter, both voluntary and involuntary, is a crime included within the charge of murder. Sansone v. United States, 380 U.S. 343, 359-350 (1965); Berra v. United States, 351 U.S. 131, 134 (1956); Stevenson v. United States, 162 U.S. 313 (1896); Wright, FEDERAL PRACTICE & PROCEDURES, §515 at 372 (4th ed. 1969).

Further, as a matter of right, a defendant is entitled to an instruction on this lesser charge if the evidence would permit the jury to find him guilty of that offense. Sansone v. United States, supra; Berra v. United States, supra; see also Sims v. United States, 405 F.2d 1381, 1384 n.5 (D.C. Cir. 1968); Belton v. United States, 382 F.2d 150, 155 (D.C. Cir. 1967); Broughman v. United States, 361 F.2d 71, 72 (D.C. Cir. 1966); Greenfield v. United States, 341 F.2d 411, 412-413 (D.C. Cir. 1964). Thus, the only question is whether any version of the facts presented below would support a jury verdict of involuntary manslaughter.

The standard for the quantum and quality of evidence necessary to mandate the instruction is very low: the charge must be given if

> ... there is any evidence, however weak, tending to show manslaughter.
>
> Sims v. United States, supra, 405 F.2d 25 1384, n.5. Emphasis added.

The rationale for the rule is obvious. Findings of fact,

which require assessment of witness credibility, are solely within the province of the jury. The jury may give credence to testimony which to the judge might appear incredible because of the strength of the Government's case. Stevenson v. United States, supra, 162 U.S. at 315; Belton v. United States, supra, 382 F.2d at 155.

Moreover, since the jury is empowered to accept any portion of a witness' testimony while rejecting the balance, the charge on a lesser offense must be given even if such a finding would require rejection of a substantial portion of the defense case. Belton v. United States, supra, 382 F.2d at 155-157; Broughman v. United States, supra, 361 F.2d at 72; Womack v. United States, 336 F.2d 959 (D.C. Cir. 1964).

With this as a background, it is clear that Judge Costantino was in error when he refused to charge the jury on involuntary manslaughter. The fact that Hendrix used his boots to kick Kiedinger does not automatically mean that Hendrix committed a felony rather than a misdemeanor assault. Judge Costantino's "finding" that the boots, as used, were a "dangerous weapon" was simply not within his province to determine. Greenfield v. United States, supra, 341 F.2d at 412.

In Greenfield, reversible error was found because the trial judge decided that a glass soda bottle (an instrument with the potential properties of a knife) was a "dangerous weapon" which precluded a misdemeanor assault charge. The

Court of Appeals there held that whether the bottle, in the circumstances in which it was used, was a dangerous weapon was a question of fact for the jury to determine, and the refusal so to charge required reversal.

So, too, in this case. The issue of whether the boots constituted a "dangerous weapon" was solely within the province of the jury to decide. Judge Costantino's refusal to permit a jury determination on that issue requires reversal of the judgment.

The same rationale applies to the issue of whether Hendrix intended to kill Kiedinger. Whether Hendrix went to Kiedinger's cabin to reestablish their friendship or to "act like a lion instead of a lamb" is irrelevant. In either case, Hendrix' reason for going to the cabin does not preclude a finding that he did not intend to kill and that his acts constituted only a simple assault which accidentally produced death. Important to a showing that there was no intent to kill is the uncontradicted evidence that, despite the accessibility of weapons -- axes were located at every fire station on the ship -- Hendrix was unarmed when he arrived at Kiedinger's quarters.

No evidence was presented as to the specific facts of the fight. Hendrix had no memory beyond the point at which he began to kick Kiedinger. The coroner testified that the cause of death was asphyxiation by strangulation, and that does not establish intent to kill as a matter of law. Not

only was the jury free to reject the coroner's testimony, even accepting it does not preclude a finding that Hendrix did not intend to kill Kiedinger. Dr. Kinnel testified that Hendrix' behavior may be explained in terms of his belief that an evil force existed in Kiedinger. Appellant's actions, thus, may have been his own bizarre attempt to exorcise this "evil." Surely it is possible that Hendrix did not appreciate the force of his hands, and in that context he was entitled to have the jury determine whether he intended to cause death.

The District Court's refusal to charge on the lesser-included offenses of voluntary and involuntary manslaughter requires that the conviction for murder be reversed.

Point III

THE FAILURE TO EXERCISE DISCRETION IN GRANTING HENDRIX' REQUEST FOR AN INSTRUCTION DIRECTING THE JURY THAT A VERDICT COULD BE BROUGHT IN FINDING HENDRIX NOT GUILTY BY REASON OF INSANITY WAS ERROR MANDATING REVERSAL.

Defense counsel requested that the jurors be instructed that they had the option of finding Hendrix not guilty by reason of insanity. Counsel reasoned that this option would compensate for the jurors' understandable reluctance to acquit Hendrix in these circumstances. This charge had been given in the first trial.

Moreover, it is a charge which has been given and has survived challenge in other circuits. United States v. McCracken, 488 F.2d 406, 415-421 (5th Cir. 1974); United States v. Skinner, supra; United States v. Harper, 460 F.2d 705 (5th Cir. 1972). In fact, in Harper, the only verdict alternatives given were "guilty" or "not guilty by reason of insanity."

Despite this history, Judge Costantino, based on his misreading of United States v. Barrera, 486 F.2d 333, 339 (2d Cir. 1973), believed that he did not have the power to grant counsel's request. All the Barrera Court said on this issue was:

> This Circuit does not provide for a verdict of "not guilty by reason of insanity" as requested by appellant.

An analysis of Barrera, which is based on United States v. Freeman, 357 F.2d 606, 626 (2d Cir. 1973), reveals that it does not preclude giving the requested verdict alternative. To the contrary, Freeman suggests that this verdict alternative is particularly appropriate.

What Judge Kaufman's opinion in Freeman, 357 F.2d at 625-626, made clear was that the new standards there enunciated for adjudging insanity mandate that there be Federal legislation to deal with persons found not guilty by reason of insanity and that until that time those persons must be turned over to State officials for commitment pursuant to State procedures. Obviously, toward that end, a verdict alternative of "not guilty by reason of insanity" is essential. Without that alternative, the only course open to a jury which finds the defendant to be insane is to return a "not guilty" verdict. On its face that verdict means that the prosecution had failed to establish any elements of the crime. Absent the verdict requested, the jury's real reasons for acquittal will be nowhere articulated, and the defendant is thereby insulated, certainly without further extensive procedures, from commitment by State authorities.

Hendrix was entitled to have the judge exercise his discretion in this matter, and Judge Costantino's failure to do so is reversible error. United States v. Brown, 470 F.2d 285 (2d Cir. 1972).

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and a new trial ordered.

Respectfully submitted,

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76-1083

To be argued by
SAMUEL H. DAWSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1083

UNITED STATES OF AMERICA,

Appellee,

—against—

JAMES M. BENDEIA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR APPELLEE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1083

UNITED STATES OF AMERICA,

Appellee,

—against—

JAMES M. HENDRIX,

Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

Appellant James M. Hendrix appeals from a judgment of conviction entered on February 20, 1976 after a jury trial in the United States District Court for the Eastern District of New York (Costantino, *J.*), which judgment convicted appellant, as charged, of murder in the second degree, in violation of Title 18, United States Code, Section 1111.[1] Appellant was sentenced to nine years imprisonment and is currently serving that sentence.

On this appeal, appellant understandably does not challenge the sufficiency of the evidence against him, nor does he question the quality of the Government's evidence re-

[1] This was appellant's second trial. His first trial resulted in a mistrial after the jury failed to reach a verdict.

butting his insanity claim, but rather alleges that the trial court (1) erred in instructing the jury as to the "presumption of sanity"; (2) despite its willingness to instruct on the lesser included offense of voluntary manslaughter, should have instructed on involuntary manslaughter; and finally (3) erred in failing to entertain a defense request for a third form of verdict, to wit: "not guilty by reason of insanity".

Statement of Facts

A. The Government's Case-in-Chief[2]

At trial, the Government's witnesses testified to the following sequence of events that culminated in the death of Robert Kiedinger:

The S.S. Eagle Voyager, an American flag vessel, sailed under charter from the United States in November, 1974, with a shipment of grain destined for Russia (161).[3] Appellant was assigned to the Steward's Department on the vessel, with duties that included general cleanup of officer's quarters and maintenance of passageways (168).

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[2] With a view towards expediting the trial—since most witnesses had come from great distances—and to facilitate the jury's comprehension of the issues, counsel and the Court agreed that in addition to matters properly falling within the ambit of the Government's direct case, each witness could be examined and cross-examined on the issue of insanity, without the necessity of being recalled. (Transcript of appellant's first trial at 141-142, Transcript of second trial at page 16).

[3] The numbers in parentheses refer to the pagination of the transcript at appellant's second trial.

The vessel was owned by the Sea Transport Corporation, a Delaware Corporation, and registered with the United States Coast Guard (160-163).

Hendrix ran afoul of some of his shipmates almost immediately. His first roommate, Raul Giron, was forced to change quarters after two days with appellant due to his being excessively noisy and "wild and ugly" when intoxicated (321-322).[4] Giron worked in the same department as appellant, under the supervision of Robert Kiedinger (315-316). Giron recalled that when Kiedinger tried to advise Hendrix that if Hendrix would do his work they would never have "any trouble," Hendrix' response was to turn his back and walk away (318).

A glimpse at the depth of appellant's hatred for Kiedinger was obtained when several crewmen testified to Hendrix' vilification of Kiedinger during a shore leave interlude at Gibraltar. While in a launch returning the crew to the Eagle Voyager, Hendrix, apparently intoxicated, called Kiedinger a "mother fucking baby raper" (281). It was only after the Chief Mate, William Bellinger chastised Hendrix for sounding "like a punk" that Hendrix felt the need to apologize (453).[5] Kiedinger meanwhile removed himself to another section of the launch (453, 484).

While Kiedinger was in the best position to evaluate Hendrix' performance of his duties, (318, 447, 450), Hendrix' own attitude was illuminated by the results of a search of his room shortly after the murder. In addition

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[4] In response to a question by defense counsel, Giron also testified that when the Eagle Voyager was in Galveston, Texas, appellant assaulted a shipmate who tried to prevent Hendrix from bringing a woman onboard the vessel (337-338).

[5] The appellant testified that his remark to Kiedinger stemmed from Kiedinger's commenting upon Hendrix' rather open and notorious use of drugs on board ship (635-636). Hendrix' apology in the launch, apparently was to the Chief Mate, who had told him to "shut up" (636).

to several empty and several full bottles of alcoholic beverages being found in his room (466, 527-528), Hendrix had secreted a quantity of hashish behind a light switch plate (418, 444).[6]

In order to appreciate the events that culminated in the death of Robert Kiedinger, a recitation of the so-called "logging" incident is required.[7] According to the testimony of Captain Hamilton G. P. Thomas,[8] Kiedinger endeavored to have the appellant reprimanded on the morning of December 28th. Kiedinger complained to the master about Hendrix' work habits and requested a logging (519-520). The master authorized Kiedinger to bring appellant before him for the proceedings detailed in the margin, but Hendrix was nowhere to be found (520). The next morning, at about 9:00 a.m., Kiedinger brought Hendrix to the master's office for logging and the matter

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[6] Appellant was fully aware that possession of such a narcotic drug on board an American ship was prohibited (633). Similarly prohibited were the other drugs—heroin and opium—that appellant used "in the course of [his] travels around the world" (632). Hendrix' only dispute with respect to the hashish exhibit was the disclaimer that he did not hide it behind a switch plate, but rather "stowed" it away in the steward department bathroom (633-634).

[7] "Logging" is a shipboard procedure whereby a head of a department prefers charges against a crewmember. It encompasses such matters as being intoxicated, neglect of duties and abusiveness to superiors. With the master of the vessel acting as hearing officer, the crewman is advised of the complaint, and given an opportunity to respond. The master enters the charge, the response and the decision, in the official log of the ship. If the charge involved a failure to work, the crewman might be penalized a day's wages. Moreover, the record of the logging is referred to the shipping commissioner (447-449).

[8] Captain Thomas was Sea Transport's agent in the port of Odessa, Russia, as distinguished from the master of the vessel (514).

was concluded (521).[9] About an hour later, while Kiedinger and the boatswain, Johnson, were conversing in the messhall, appellant came in and asked Kiedinger if Kiedinger still had a gun that he purchased in port (171-172). Hendrix was told that the gun had been locked up by the master (apparently in a chest to which the master had the only key) (173).[10]

The appellant's other activity on December 29th notwithstanding, a common thread running through his varous encounters with fellow crewmen was his distress and bitterness over the logging. To Giron, the messman, Hendrix volunteered his being "upset" at having been logged (329-330). To Hearne, the radio officer, appellant seemed "distressed and upset" for what Hendrix considered to be unfair treatment in connection with the logging (367-368). To Elholm, the chief engineer, Hendrix expressed bitterness for having been "chewed out" (417). When appellant raised the matter with Bellinger, the chief mate, Bellinger told Hendrix "not to let it bother him" (483, 449). When seaman Jones saw appellant later that night, Hendrix, besides being intoxicated, appeared "agitated by something" (402-403). Finally, to Minnier, an oiler, the appellant was most explicit. Hendrix told him

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[9] Appellant would press upon this Court the notion that the logging was so inconsequential a matter as to hardly justify, let alone rationally compel, a murderous act. Appellant's Brief, p. 4, n.7. In dealing with matters of motivation, human conduct does not always run a course that would seem logically required, particularly to a dispassionate observer aided by hindsight. Suffice it to say that the jury by it's verdict, found malice and not insanity.

Idle speculation as to all the ramifications of a logging is pointless. However, appellant himself testified that as a result of his being involved in an assault on the S.S. Jeff Davis, the Coast Guard, after a hearing, suspended his seaman's papers (631, 708).

[10] Johnson related that prior to the gun being locked up he had disassembled it (237).

that he, Hendrix, had "had enough bullshit from the Steward" and he was "going to stop acting like a lamb and start acting like a lion" (271-272).

Sometime after the morning logging and appellant's inquiry as to the status of the gun, Hendrix left the ship and went ashore (346). Gary Carter, a fellow shipmate and acquaintance of appellant from Texas, saw Hendrix at 4:00 p.m. Hendrix, already intoxicated at this hour, told Carter that Kiedinger had required him to be back onboard the ship and working by that hour (347).[11]

Around 9:00 p.m., Hendrix joined a party in progress in the room of Daniel Minnier and Arlen Jones (269-270). Hendrix was still intoxicated and continued his drinking at the party (272). After indicating that he had had enough from Kiedinger, and announcing his new intention to act like a lion (or a man), Jones and the others ushered Hendrix out of the room (271-402).

Just prior to the intended sailing of the Eagle Voyager that night, Harry Allaire went from room to room making a crew count. Sometime after 1:00 p.m. he came upon appellant in the room of seaman DeLatte. According to Allaire it appeared that the men were having some sort of party (310-311).[12]

By 1:00 a.m. Robert Kiedinger lay dead on the floor of his room (193-195, 524-525).[13] At that time Hendrix

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[11] In light of Hendrix' state of intoxication and his continuing complaints about having been logged, this interruption of his shore leave privilege no doubt heightened his animosity toward Kiedinger.

[12] Allaire was offered, but refused a drink.

[13] Dr. DiMaio, New York City Chief Medical Examiner, performed a reautopsy upon the deceased. He determined that the cause of death was asphyxiation by manual strangulation—a neck bone being broken—coupled with multiple abrasions, contusions and lacerations about the face and neck. Dr. DiMaio also testified that the deceased had suffered a fractured nose. (501-504, 507).

pounded on the door of Gary Carter's cabin. Apparently still drunk, Hendrix said that he had just killed Kiedinger. When Carter's roommate fled the room, Hendrix asked Carter to help him get rid of his bloodsoaked bluejeans and boots (348-351).[14] Before the clothing could be disposed of, the roommate returned, a circumstance that apparently forced Carter and Hendrix to leave the cabin (352). As they were exiting, they came upon Daniel Minnier, on his way to a night shift assignment. Standing within a few feet of one another, Minnier noticed blood on Hendrix' jeans and forearms. Appellant warned Minnier not to say a word (277-279).[15]

By now the crime had been discovered and a search was underway for Hendrix (193-197, 325-326, 455-456).[16] Several of the ship's officers found him sitting in the room of seaman Manning, engaged in conversation (457, 195-197). Handcuffed, cursing and pulling, Hendrix was removed to the officer's lounge in midships (197-198, 327-328, 457). Further search turned up the appellant's bloodstained boots.[17] In the lounge appellant was confined to a side area primarily in the custody of the chief mate (461-462). When radio officer Hearne arrived, Hendrix confided to him that he (Hendrix) was in serious trouble and going "to catch it'. Hendrix was also anxious about

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[14] Hendrix was barechested at that time and showed no sign of any cuts or bruises (351).

[15] Appellant claims the confrontation in the passageway was "*innocuous*" (emphasis added). Appellant's Brief, p. 7 Appellant's characterization is betrayed by the fact that Hendrix, standing there in bloody pants, felt the necessity to warn Minnier twice (in expressive terms), while pointing a finger at him (278).

[16] Captain Thomas noted that in his opinion the deceased's room showed no sign of any struggle (529-530). Other crewmen observed that Hendrix was without any visable cuts, marks or bruises (200-201, 279, 327, 351, 459).

[17] The boots were found either in Hendrix' room (326), or in a firestation outside of seaman Jones' quarters (407).

what hight happen to him (379, 493, 536).[18] Though, in Hearne's opinion, appellant was intoxicated, he impressed Hearne as understanding the advice Hearne gave him to say as little as possible (379-380). Hendrix remained in the midship lounge for about five hours, during which time he talked continuously to Bellinger (462-463). While most of their talk was idle chatter, the appellant was visibly upset (465, 469). Indeed, Bellinger was impressed with the fact that the earlier logging incident still distressed Hendrix (469).[19] Though the chief mate was obviously unable to recall most of the conversation with appellant that night (463), he did remember Hendrix stating:

> "The steward [Kiedinger] deserved to die. When you fight, you fight to kill" (462).

By 5:00 a.m. it was apparent that the Russian authorities were not going to take any action that night. As a result, Hendrix was taken to a spare room, where he

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[18] Russian Immigration and Customs officials were also present in the midship lounge (523-524). Appellant's apprehension about being turned over to Russian authority was shared by the chief-mate. As Bellinger put it, ". . . none of us knew where we stood" (463).

Billinger's reference to Hendrix as "irrational" was explained as meaning very upset, very nervous, very concerned and worried (496-497). Cf., Appellant's Brief, at 8-9. With respect to the attribution to Minnier of the appellant being "strange" (Appellant's brief, at 8-9), Minnier clearly denied such an assertion (283, 303-304). Giron explained his use of the term "crazy" to mean that appellant was arguing with the captain; attempting to avoid being taken by the captain to the lounge; *wild* (342-343). Arlen Jones however, certainly testified that Hendrix was "mixed up"—when *intoxicated* (407).

[19] As Bellinger put it:

> "This log upset him seemingly more than it deserved. It really upset him" (469).

was detained [20] until he was removed from the ship at the city of Podi, Russia, (465-466, 530-531). Captain Thomas escorted appellant to Moscow, where they were joined by United States Marshals for the flight to New York (531-532). Hendrix was formally arrested at John F. Kennedy International Airport (541-542).

B. The Defense

The defense relied primarily on the testimony of three witnesses: Henry Manning, James Hendrix and Dr. Augustus Kinzel.[21]

Manning was the third cook on the Eagle Voyager and knew Hendrix from Houston, Texas (570-571). When questioned as to whether appellant did anything strange or unusual, Manning related that Hendrix would occasionally sing insulting poems [22] in the evening which he would not remember the next day (579-580).[23] In any event, Manning felt that for long periods of time on the voyage appellant behaved in a perfectly normal manner and did nothing strange (594). On the night of December 29th Hendrix came into Manning's room and told him that he, Hendrix, had killed Kiedinger (590). That night

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[20] Before being placed in the detention room, Hendrix asked Thomas if Kiedinger was dead (528). Appellant repeated this inquiry the next morning to Arlen Jones who had been assigned to guard the room (406). Jones testified that "...I asked Jim if he remembered last night. He said yes, he did" (406).

[21] Pursuant to stipulation, the defense introduced four 1971 letters of crewmen who served with appellant aboard the S.S. JEFF DAVIS (561-567).

[22] Apparently this balladeering did not endear Hendrix to some of his fellow crewmen (580, 582-583).

[23] It is difficult to assess what is truly strange or bizarre to Henry Manning. On cross-examination Manning stated that the day after the murder he believed he saw the ghost or spirit of Robert Kiedinger on the ship (593-594).

in Henry Manning's cabin, Hendrix said that he knew what he had done and that what he did was wrong (597).

James Hendrix claimed at trial that after "knocking" Kiedinger to the floor of Kiedinger's room and kicking him with the heels of his boots he had no recollection of subsequent events[24] until the moment he was removed, handcuffed, from Manning's room (639, 643-644).[25]

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[24] Hendrix did recall that prior to going to Kiedinger's room he smoked some hashish (665-666).

[25] This gap in recollection seemed to selectively expand and contract during cross-examination. A few examples follow:

"Q. Is it your testimony that on the morning of December 29th, you don't remember asking Mr. Kiedinger, the steward, whether he still had that gun in his room? A. I don't remember . . ." (658).

* * *

"Q. Do you remember being in Mr. Manning's room? A. Yes, sir.

Q. Do you remember being taken out of that room? A. Yes, sir.

Q. Do you remember sitting in a chair talking to him? A. I was in a wild state of mind. I don't remember what I said.

Q. When Mr. Manning testified—do you remember telling him in that room that you knew what you did and what you did was wrong? A. No, sir.

Q. You don't remember that? A. No, sir" (660).

* * *

"A. . . . . I don't remember going up to the lounge drinking coffee, smoking cigarettes.

Q. How about telling Mr. Billinger that the steward deserved to die? A. No, sir.

Q. You don't remember that? A. No, sir" (661).

* * *

"Q. You remember being taken to the lounge by the second mate? A. All in a haze" (661).

* * *

"Q. Now sir, in the midship lounge did you tell Mr. Hearne, as he testified here, that, "I am in trouble now.

[Footnote continued on following page]

Hendrix recounted for the jury some of his activity on the day of the murder. After completing his morning chores, he went ashore and visited a Russian girl with whom he had become friendly. Hendrix had dinner with the girl's family and went into the suburbs of Odessa to visit her grandmother. On that last day together, they had a photographer take some pictures and had a final meal at a local restaurant (684-688).

Dr. Augustus Kinzel, a psychiatrist called by the defense, testified that in his opinion Hendrix was undergoing a mental breakdown *before* the murder on December 29th (757). In concluding that appellant was insane at the time of the killing, Dr. Kinzel asserted that the appellant's intake of alcohol and drugs on the day in question would not directly have produced "murderous behavior", but may have made him "somewhat assaultive" (767-768). In recounting some impressions he obtained during his examination of Hendrix, Kinzel recalled that Hendrix had "a very strong tendency to deny he's mentally ill", and tried to make it seem to the doctor that he was quite rational (760). Hendrix sought to minimize his guilt rather than maximize his mental illness (760). It was this attempt at rationality, coupled with appellant's antipathy for demonstrating mental illness that led Kinzel to conclude that Hendrix was not malingering and was indeed insane (759-761).[26]

I am really going to catch it"? A. I really don't remember" (682).

* * *

"Q. Do you remember Mr. Hearne telling you that your best course would be not to say anything? A. Yes, sir, I do remember that" (682).

[26] As to appellant's statement to Bellinger: "The steward deserved to die", and "when you fight, you fight to kill", Kinzel concluded:

[Footnote continued on following page]

With respect to appellant's secreting his hashish behind the light switch plate, Kinzel found that fact to be of significance. Indeed, the doctor felt that act indicated that Hendrix *knew* that if the drugs were discovered on his person, he would be "in trouble with the law" (812).[27] Dr. Kinzel attributed special importance to the incident in September, 1971, wherein the appellant was hospitalized in Karachi, Pakistan, as a result of a fight on the S.S. JEFF DAVIS (782-784, 788). The doctor acknowledged however, that in the opinion of the psychiatrist attending the appellant in Karachi, Hendrix' condition in 1971 may very well have been due to the *excessive* use of drugs — namely, marijuana (819-820). Moreover, Kinzel was not

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"[H]e was trying to make it seem as if it was a rational act. . . A reasonable thing rather than an irrational act" (773-774).

In contrast to Kinzel's belief that Hendrix was not malingering, Dr. Taub, of the United States medical facility at Springfield, opined that appellant was making a heavy effort to appear psychotic, and he questioned appellant's motive for doing so (802-803).

[27] It should be noted that Dr. Kinzel claimed ignorance of many facts testified to at trial. For example:

1. He did not know that Hendrix had asked Kiedinger about the status of the gun (817-818).
2. He did not know about Hendrix' activities with the Russian girl and her family during the day of the murder (833-834).
3. He was not aware of Hendrix' concern about being turned over to Russian authority (807).
4. He was not aware that Hendrix told Manning (whom Kinzel believed to be reliable) that he knew what he did and that what he did was wrong (806).
5. Notwithstanding Gary Carter's testimony that Hendrix sought his help in getting rid of the bloody pants and boots, Kinzel, in his report of examination, noted that Hendrix made no attempt to avoid detection (836-837). Kinzel conceded however, that such evidence might constitute an attempt at avoidance of detection (838).

aware of the fact that Hendrix, after a brief stay at the hospital in Karachi, had been permitted to fly back to the United States unescorted (821), or that shortly after his return to the United States, Hendrix shipped out again on another vessel, the S.S. DEL RIO (708, 822).

Finally, Dr. Kinzel attached importance to the fact that Hendrix was unable to recall to him the details of the killing beyond a recollection of kicking the deceased (757-758). However, when confronted with the report of Dr. Irwin Perr,[28] where Hendrix stated that Kiedinger was beaten *after he was strangled*, Kinzel conceded the variance in the appellant's claimed recollections (835-836).

C. The Government's Rebuttal Case.

The Government called Dr. David Abrahamson to rebut the appellant's claim of insanity.[29] As a result of his examinations of Hendrix, and his study of voluminous materials,[30] Dr. Abrahamsen stated that it was his considered opinion that:

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[28] Dr. Perr testified for the defense at the first trial, but not at the second (Transcript of July 5, 1975, pp. 650-755).

[29] The Government will not burden this brief or the Court with a lengthy recitation of Dr. Abrahamsen's extensive qualifications, unchallenged by the defense, and attained after over forty years as a practicing psychiatrist (864-870). Suffice it to say that Dr. Abrahamsen was a member of the select commission in New York State that formulated for that state the definition of legal insanity also adopted by this Court in *United States* v. *Freeman*, 357 F.2d 606 (2d Cir. 1966).

[30] Dr. Abrahamsen relied on the following:

1. Two examinations he conducted of appellant;
2. Statements of crewmembers to the Federal Bureau of Investigation;
3. Statements by several crewmembers to the American Vice Consul;

[Footnote continued on following page]

> . . . . The defendant, Mr. Hendrix, at around midnight on December 29th, 1974, on the ship Eagle Voyager, didn't suffer from any serious mental disease or defect. And that he didn't lack any substantial capacity to know or to appreciate the wrongfulness of his conduct, or to conform his behavior to the requirements of the law (873).

Abrahamsen concluded that Hendrix' statements to various crewmen shortly after the murder indicated an awareness and an appreciation on appellant's part of the significance of his act of killing Kiedinger (874-877, 879-883, 910). Moreover, the doctor believed that Hendrix' actions and statements demonstrated appellant's belief in his own guilt (881). In contrast to Kinzel's progressive "mental breakdown" theory, Dr. Abrahamsen noted that Hendrix' activity with his Russian girlfriend on December 29th portrayed a man who was acting in a very rational and coherent manner (883-884). It was also perfectly consistent with rational behavior that appellant tried to secrete his hashish, the possession of which he knew was wrong (881-882).

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4. Coast Guard reports.
5. The report of the medical team at the facility at Springfield;
6. The tests administered to the appellant at Sprinfield;
7. Statements by the United States Marshals who accompanied Hendrix from Moscow to New York;
8. The report of the United States Public Health Service;
9. Hendrix' public school records;
10. The report of Dr. Perr;
11. The report of Dr. Kinzel;
12. The report of Dr. Schwartz;
13. The report from the authorities at Karachi, Pakistan; and,
14. The transcript of testimony of the witnesses at trial (870-873, 884-885).

The Government also introduced testimony from various members of the crew that during the voyage appellant never said or did anything that could be considered strange, bizarre or unusual (205, 281-282, 329, 382, 407). Captain Thomas characterized Hendrix' behavior during the journey from the ship to New York, via Moscow, as perfectly normal (533).

The trial court, as it had at the first trial, instructed the jury on the role of the presumption of sanity.[31] No exception was taken to this charge (1002, 1030). Though the trial court was willing, if requested, to instruct the jury[32] on the lesser-included offense of voluntary manslaughter the defense, for "tactical" reasons, felt that unless involuntary manslaughter was included it would forego any lesser-included offense instruction.[33]

After instructing the jury as to the applicable principles of law, including the Government's burden of proof with respect to both the elements of the offense and the issue of insanity, the Court instructed the jury that their verdict should take the form of either "Guilty" or "Not Guilty".

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[31] Counsel at the first trial carefully reviewed the intended charge generally and the presumption of sanity portion in particular (Transcript of July 9, 1975 at 861-863). The colloquy referring that portion of the charge is 1a-3a in the Government's appendix. The court's charge on this point, at the first trial is 3a-7a in the Government's Appendix.

[32] By incorporation, this offer and refusal at the first trial were placed in the record at the second trial.

[33] The colloquy on this issue at the first trial is 7a-10a to the Government's Appendix.

ARGUMENT

POINT I

The Court's instructions correctly placed upon the Government the burden of proving Hendrix' sanity beyond a reasonable doubt.

The trial court fairly and correctly instructed the jury on all applicable principles of law pertaining to this case. Counsel for appellant reviewed the charge before its delivery and candidly stated that he had "no complaint" with its wording or substance (1002), and there was no exception taken to the court's instructions as given (1030). Appellant now complains that an unobjected to reference [34] to the presumption of sanity in the charge was error of such magnitude as to warrant reversal. In effect, the complained of portion, set forth in f.n. 34, according to the appellant, erroneously permitted the jury to consider the presumption of sanity. The Government contends that this was not error. Indeed, appellant's experienced trial counsel expressly agreed to the inclusion of this presumption in the court's charge so long as "it was made clear that the Government has the burden of proving the question of defendant's sanity." (Government Appendix 2a-3a). This the court did.

After advising the jury that the Government's obligation was to prove beyond a reasonable doubt all the

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[34] You may also consider that every man is presumed to be sane, that is, to be without mental disease, and to be responsible for his acts. A presumption may however, be overcome by evidence. You should consider these principles in light of all the evidence in the case, and give them such weight as you believe they are fairly entitled to receive (1015).

elements of the crime of murder in the second degree, the court went on to instruct as follows:

> If however, you find that the Government has proved each essential element of the offense beyond a reasonable doubt, then you must consider the defense of lack of criminal responsibility, or as it is sometimes called, the defense of insanity.
>
> The law provides that a jury shall bring in a verdict of not guilty if the following test is met: The defendant must be found not guilty if, at the time of the criminal conduct, the defendant, as a result of mental disease, either lacked substantial capacity to conform his conduct to the requirements of the law, or lacked substantial capacity to appreciate the wrongfulness of his conduct.
>
> A defendant who is intellectually aware that his act is wrongful is not responsible for that act if he does not appreciate the wrongfulness of that act because mere intellectual awareness that conduct is wrongful, when divorced from appreciation or understanding of the moral or legal import of behavior can have little significance.
>
> Every man is presumed to be sane, that is, to be without mental disease or defect, and to be responsible for his acts. But that assumption no longer controls when evidence is introduced that he may have a mental disease or defect.
>
> The defense of lack of criminal responsibility, or as it is sometimes called, the defense of "insanity" does not require a showing that the defendant was disoriented as to time or place.
>
> Mental disease includes any abnormal condition of the mind, regardless of its mental label, which substantially affects mental or emotional processes and substantially impairs behavior controls. The

> term "behavior controls" refers to the processes and capacity of a person to regulate and control his conduct and his actions.
>
> In considering whether the defendant had a mental disease at the time of the unlawful act with which he is charged, you may consider testimony in this case concerning the development, adaptation and functioning of these mental and emotional processes and behavior controls.
>
> The burden is on the Government to prove beyond a reasonable doubt either that the defendant was not suffering from a mental disease or defect, or else that he nevertheless had substantial capacity both to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct. If the Government has not established this beyond a reasonable doubt, you shall bring in a verdict of not guilty. (1010-1012).

The court thereafter charged the jury on the psychiatric and lay witness testimony bearing on the insanity issue. While the court advised the jury that they were not bound by the opinions of expert or lay witnesses, the court continued that such testimony should not be arbitrarily or capriciously rejected.

The court concluded this portion of its charge with a brief reiteration of the presumption of sanity. It is this segment, set forth above, at f.n. 34, taken out of context that appellant claims to be error.[35]

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[35] Immediately after this reiteration, the trial judge instructed the jury as to the additional relevancy of the appellant's insanity evidence. This portion of the charge is as follows:

> Where a defendant has raised the issue of his insanity, and the jury finds from the evidence in the case beyond a reasonable doubt that the accused was not insane at the time of the alleged offense, it is still the duty of the jury

[Footnote continued on following page]

It is appellant's contention, distilled to its essence, that the clear and succinct initial statement by the court on the presumption of sanity (1010-1012), was somehow destroyed by the later recapitulation (1015). Moreover, it is urged that despite the court's repeated and unequivocal instructions on the Government's burden of proof, the jury was driven to the verdict ultimately rendered.

As a preliminary proposition, the law is clear that if defense counsel thought the two references to the presumption of sanity were inconsistent or that the one was prejudicial, it was his obligation to so advise the court.[36] His failure to do so, requires an appellate court to examine the charge in its entirety to determine if the portion complained of was so substantial as to constitute plain error. See, *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975); *United States* v. *Bermudez*, 526 F.2d 89 (2d Cir. 1975). Upon such a reading it is obvious that, at the very least, the district court's first instruction on the presumption of sanity was correct and that the Government's burden of proof was forcefully set forth. *United States* v. *Davis*, 328 F.2d 864 (2d Cir. 1964); *United States* v. *Retolaza*, 398 F.2d 235 (4th Cir. 1968), *cert. denied*, 398 U.S. 1032.

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to consider all the evidence in the case which may aid determination of state of mind, including all evidence offered on the issue as to insanity, in order to determine whether the defendant acted or failed to act with the requisite malice aforethought, as charged.

If the evidence in the case leaves the jury with a reasonable doubt whether the mind of the accused was capable of acting with the requisite malice aforethought to commit the crime charged, the jury should acquit the accused.

As stated before, the law never imposes upon a defendant the burden or duty of calling any witnesses or producing any evidence (1015-1016).

[36] The specific language of the instruction was discussed at the first trial and resolved to the satisfaction of defense counsel (Government's Appendix, 1a-3a).

Turning to an analysis of the actual charge, the court initially told the jury that since evidence of insanity has been introduced during the course of the trial, the presumption of sanity "*no longer controls*" (emphasis added). From that point on the jury knew that the presumption was out of the case. The court, in effect, had merely used the presumption of sanity as nothing more than a convenient starting point for its complete, detailed and accurate instructions on appellant's insanity defense. Appellant would now elevate that starting point in the instruction, to an end in itself. To do as appellant urges, would give that instruction too much weight and the remainder of the charge none whatsoever.

When viewed *in toto*, it is obvious that the district court correctly charged that the Government had the burden of proving that the appellant was sane beyond a reasonable doubt. This is exactly what is required. Accordingly, there was no reversible error, if any error at all.

POINT II

The trial court correctly concluded that there was no evidence, however weak, upon which the jury could have rationally returned a guilty verdict of involuntary manslaughter; and to have charged that crime as a lesser-included offense would have been to invite speculation and compromise.

Counsel for appellant conditionally requested that the court charge the jury on the allegedly lesser-included offenses of voluntary and involuntary manslaughter (Government's Appendix at 7a-8a).[37] It was conditional in that, unless the court was agreeable to instructing

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[37] Defense counsel's request made during the first trial was incorporated by reference as his request for the charge in the second trial (3-16).

both offenses, counsel wanted to proceed solely on the charge of murder in the second degree (Government's Appendix 8a). It was trial counsel's theory that the jury "might be satisfied" that Hendrix merely committed a simple assault upon Kiedinger when he kicked him repeatedly in the head. Both the court and the prosecutor expressed doubt that such activity—uncontradicted or challenged—constituted a simple assault.

Moreover, when confronted with the evidence of strangulation, appellant's defense counsel was unable to explain to the court how the jury could rationally find a simple assault upon which guilt of involuntary manslaughter would be predicated. Thus, although counsel correctly asserted that there was evidence in the record that would justify an instruction on voluntary manslaughter,[38] he precluded the trial court from so charging unless involuntary manslaughter was charged as well.

There is no question that manslaughter is a crime included within the charge of murder, and appellant, *had the evidence permitted*, would have been entitled to an instruction on involuntary manslaughter. *Sansone* v. *United States*, 380 U.S. 343, 349-350, (1965); *Berra* v. *United States*, 351 U.S. 131, 134 (1956); *Stevenson* v. *United States*, 162 U.S. 313 (1896); *Sparf* v. *United States*, 156 U.S. 51, 63-64 (1895).

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[38] Appellant pointed out that psychiatric testimony submitted by the defense allowed for the explanation that the killing was the result of a sudden heat of passion. No testimony was called to the court's attention justifying simple assault and derivatively, involuntary manslaughter. Appellant speculates that, "if a simple assault produced a death, the highest degree of crime would be involuntary manslaughter." Appellant's Brief, p. 27. Such conjecture "in the teeth of both law and facts" is precisely that kind of irrationality that would have precluded a guilty verdict on involuntary manslaughter. *United States* v. *Markis*, 352 F.2d 860, 867 (2d Cir. 1965), *vacated on other grounds* 387 U.S. 425 (1967), quoting from *Horning* v. *District of Columbia*, 254 U.S. 135 (1920).

The initial inquiry however, is whether or not there was a disputed factual element which would have permitted the jury to rationally conclude that Hendrix was guilty of a lesser offense but not guilty of the greater. *United States* v. *Harary*, 457 F.2d 471 (2d Cir. 1972); *United States* v. *Markis*, 352 F.2d 860 (2d Cir.), *vacated on other grounds*, 387 U.S. 425 (1967); Model Penal Code, § 1.07(5). Had appellant requested and been refused an instruction on voluntary manslaughter, the answer would be clear. The only factual element in dispute was whether Hendrix went to Kiedinger's room with malice aforethought or to "rehabilitate" his friendship. If he killed under the latter circumstances an argument might be made for a killing upon a sudden quarrel or in the heat of passion. But appellant's all or nothing direction to the trial court removed the possibility that the jury might accept such an argument.

There is no question however, but that there was no evidence pointing toward a simple assault.[39] Only if there was a foundation in the evidence for the notion of simple assault could the court have properly instructed on involuntary manslaughter. *Sparf* v. *United States*, *supra*, 63-64; *United States* v. *Carroll*, 510 F.2d 507, 509 (2d Cir. 1975); *cf. United States* v. *Marin*, 513 F.2d 974 (2d 974 (2d Cir. 1975). In the absence of such competing factual contentions, to instruct on a lesser-included offense, such as was requested here, would:

> . . . "[O]nly invite the jury to pick between the [greater and lesser degrees] so as to determine the punishment to be imposed, a duty Congress has traditionally left to the judge. *Sansone* v. *United States*, *supra*, at 350 n.6; *United States* v. *Harary*, *supra*, 477.

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[39] See, *United States* v. *Hamilton*, 182 F. Supp. 548 (D.D.C. 1960), (shoes are dangerous weapons when they inflict serious injury).

As stated by the Court of Appeals in *Driscoll* v. *United States*, 356 F.2d 324, 327 (1st Cir. 1966), *vacated on other grounds*, 390 U.S. 202 (1968), the import of *Sansone* is:

> That when the government has made out a compelling case, uncontradicted on the evidence, on an element required for the charged offense, there is a duty on the defendant to come forward with some evidence on the issue, if he wishes to have the benefit of a lesser-included offense charge.
>
> To put it another way, while a judge cannot prevent a jury from rejecting the prosecutor's entire case, he is not obligated, under these circumstances to assist a jury in coming to an irrational conclusion of partial acceptance and partial rejection of the prosecutor's case by giving a lesser included offense instruction. Two prerequisites seem vital: That there be no factual dispute and that a finding contrary to the only evidence on the issue must be irrational.

Applying these principles to the instant case, it is patent that an involuntary manslaughter instruction would have been unwarranted. Appellant claims that no evidence was presented as to the specific facts of the *fight* between Hendrix and Kiedinger.[40] The short answer is that there was no *fight* betwen the two. The record is barren of such testimony. Indeed, Captain Thomas testified that Kiedinger's room showed no sign of any struggle at all (529-530). Moreover, various crewmen testified that Hendrix had no cuts, bruises, or marks of any kind on him that might have indicated a fight. (200-201, 279, 327, 351, 459). And as for the notion that this was a simple striking so as to qualify as a misdemeanor assault,

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[40] Appellant's Brief, p. 30.

one need only recall the testimony of Johnson and Bellinger, who testified that the deceased's face was covered in blood and so disfigured as to be beyond recognition (195, 455). Additionally, the Medical Examiner related that Kiedinger's face showed numerous abrasions, contusions and lacerations as well as a broken nose (501-504, 507). Of course, as appellant contends, the jury was free to reject the medical examiner's testimony and was also free to reject the testimony of Bellinger and Johnson. However, the mere rejection of trial evidence, as this Court has held:

> ". . . does not elevate the issue to a truly 'disputed' one; . . . it does not provide a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." *United States* v. *Markis*, *supra*, 867. See also, *United States* v. *Marcey*, 440 F.2d 281, 285, (D.C. Cir. 1971).

As defense counsel had correctly determined, there may have been evidence warranting a finding of guilt for the offense of voluntary manslaughter and the trial court stood ready to so instruct. The issue would have been one of malice aforethought against sudden quarrel or heat of passion. In this Court appellant now suggests, without any support in the record, that the jury should not have been precluded from finding that death was the "accidental" result of a simple assault.[41] For the trial court to have so allowed, would have been to tolerate speculation and conjecture on the part of the jury. It would have been an open invitation to disregard the evidence of record and to render a foundationless verdict.

Counsel below made what he termed a "tactical choice" [42] when he turned aside a lesser-included instruc-

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[41] Appellant's Brief, p. 30.

[42] Government's Appendix at 10a.

tion on voluntary manslaughter in favor of an all or nothing approach. His rationale was that a murder charge versus a voluntary manslaughter charge would have invited a compromise. However, counsel's desire for a murder, voluntary *and* involuntary manslaughter charge would have stood this abhorrence of compromise argument on its head and almost certainly have compelled one.

The ruling of the court was correct, and counsel's tactical trial choice should not now be permitted to elevate it to plain error.

POINT III

The trial court, properly following the clear law of this Circuit, correctly refused to instruct the jury that appellant could be found "not guilty by reason of insanity."

Defense counsel requested that the jurors be charged that they could find the appellant not guilty by reason of insanity. The trial court ruled that such an instruction was not authorized (944-945). This was correct. In *United States* v. *Barrera*, 486 F.2d 333, 339 (2d Cir. 1973), this Court held:

> This Circuit does not provide for a verdict of 'not guilty by reason of insanity' as requested by appellant. [Citation omitted]

Therefore, the court below was without discretion in the matter and properly limited the jury to the traditional verdict forms of guilty or not guilty. *White* v. *United States*, 387 F.2d 367 (5th Cir. 1967); Wright, Federal Practice & Procedure, § 512 at 365-368.

Moreover, the trial court clearly advised the jury that even if the Government had proved Hendrix' guilty beyond a reasonable doubt they must still return a verdict of "not guilty" if the Government had not proved his sanity at the time of the murder beyond a reasonable doubt. This charge was, as follows:

> The burden is on the Government to prove beyond a reasonable doubt either that the defendant was not suffering from a mental disease or defeat, or else that he nevertheless had substantial capacity both to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct. *If the Government has not established this beyond a reasonable doubt, you shall bring in a verdict of not guilty.* (1011-1012) (Emphasis supplied).

This was, in effect, the functional equivalent of a verdict of not guilty by reason of insanity.[43]

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[43] In federal jurisdictions outside of the District of Columbia, a trifurcated verdict form makes little sense and can only create a misleading impression in the minds of the jurors. By operation of a local District of Columbia statute, verdicts of "not guilty by reason of insanity" result in proceedings leading to the institutionalization of an offender. See, D.C. Code § 24-301(d). No similar provision exists for other federal courts. While this *gap* has been signaled before, *Freeman* v. *United States*, 357 F.2d 606. 625 (2d Cir. 1966), there has been no remedial legislation; hence, no logical reason exists, absent subsequent commitment procedures, to present such a verdict. Such a verdict choice can only serve to impl. to the jury that some post-verdict confinement or treatment will occur. This, of course, is not the case, Wright, *supra*, at 368.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: July 12, 1976

Respectfully submitted,

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[*] The United States Attorney's Office wishes to acknowledge its appreciation to Mr. James Connors for his assistance in the preparation of this brief. Mr. Connors is a third year law student at New York Law School.

APPENDIX

[861]

Mr. Dawson: I would just ask Mr. Chrein as we have now worded it, whether he has any quarrel.

Mr. Chrein: I said I have none.

The Court: He has no quarrel with it, so I will charge it as I have it.

Now specific intent will be out, I have very, very grave doubts about it.

Again, as to the malice charge, well, as Mr. Dawson has given it to us plus number 8, but without the last sentence of 8.

Mr. Chrein: Your Honor, if I can raise something, the Government in its request to charge on page 5, the last paragraph of that charge says:

> "You may also consider that every man is presumed to be sane," etcetera.

Now I feel that in view of the Government's burden in this case, such a charge would only serve to confuse the jury because a presumption, as it is usually defined, is an item of proof which if no evidence is produced to the contrary, is in the case as a proven fact.

The Court: Yes.

Mr. Dawson: You are talking about what?

The Court: He is referring to page 5' "You may [862] may also consider that every man is presumed to be sane, that is, to be without mental disease or defect."

Now, I have continued on that with the words:

> "But that presumption no longer controls what evidence is introduced that he may have a mental diesase or defect."

Mr. Chrein: I think that satisfies my need.

The Court: Then I have a series of definitions.

Mr. Dawson: Well then, so your Honor will say that the man is presumed to be sane, however?

The Court: I say it no longer controls when evidence is introduced that he may have a mental disease or defect, where there is such evidence.

Mr. Dawson: Will your Honor include the last sentence on page 5?

"You should consider this principle in the light of all the evidence in the case and give it such weight as you believe it is fairly entitled to receive."

Mr. Chrein: I feel that would be objectionable.

Mr. Dawson: Objectionable?

Mr. Chrein: Tacked on to what the judge has just said.

[863]

Mr. Dawson: I just thought we are working on the presumption of sanity question.

The Court: That is all part of it, that is a part of the entire thing.

Mr. Dawson: I just thought it would be appropriate.

The Court: What is it you want?

Mr. Dawson: On page 5, the last sentence, if you do talk about the presumption of sanity, then your Honor should do something about the presumption of insanity.

The Court: I will put it right on the bottom of this page:

> "You should consider this principle in the light of all of the evidence in the case and give it such weight as it is fairly entitled to receive."

That will be after whether the defendant had a mental disease and so forth and so on That would be the presumption and it would be just the other side of the coin of the presumption.

Mr. Chrein: I would have no objection as long as it is made clear that the Government has the burden of proving the question of defendant's sanity.

The Court: We have that, beyond a reasonable [864] doubt, it is their duty.

Mr. Chrein: In addition to the elements of the crime as well as the responsibility of the defendant.

The Court: We have both.

Mr. Dawson: We have also in our request, I think the very first request, we have said:

> "The Government has offered evidence in opposition to it. The burden of proof is upon the Government to prove beyond a reasonable doubt that the defendant was responsible—that is to say, sane."

The Court: We have the whole thing.

Mr. Chrein: Your Honor, is the Court going to charge that it is relevant in considering the question of, or capacity on December 29, 1974, his condition before and after the event?

The Court: We have that, too, that will also be included. That will be in there.

Mr. Chrein: That is my second charge.

Also about the opposite end of the coin, which is in my request number 3, that is if he was sane at earlier and later times.

* * * * *

(945)

If you find that the Government has failed to prove beyond a reasonable doubt any one or more of the essential elements of the offense, you must find the defendant not guilty.

If however, you find that the Government has proved each essential element of the offense beyond a reasonable doubt, then you must consider the defense of lack of criminal responsibility.

The law provides that a jury shall bring in a verdict of not guilty if the following test is met: the defendant

must be found not guilty if, at the time of the criminal conduct, the defendant, as a result of mental disease either lacked substantial capacity to conform his conduct to the requirements of the law, or lacked substantial capacity to appre[illegible]te the wrongfulness of his conduct.

A defendant who is intellectually aware that his act is wrongful is not responsible for that act if he does not appreciate the wrongfulness of that act because mere intellectual awareness that conduct is wrongful, when divorced from appreciation or understanding of the moral or legal import of behavior can have little significance.

Every man is presumed to be sane, that is, to be without mental disease or defect, and to be responsible for (945(a)) his acts. But that assumption no longer controls when evidence is introduced that he may have a mental disease or defect.

The defense of lack of criminal responsibility, or as it is sometimes called, the defense of "insanity" does not require a showing that the defendant was disoriented as to time or place.

Mental disease includes any abnormal condition of the mind, regardless of its mental label, which substantially affects mental or emotional processes and substantially impairs behavior controls. The term "behavior controls" refers to the processes and capacity of a person to regulate and control his conduct and his actions.

In considering whether the defendant had a mental disease at the time of the unlawful act with which he is charged, you may consider testimony in this case concerning the development, adaptation and functioning of these mental and emotional processes and behavior controls.

The burden is on the Government to prove beyond a reasonable doubt either that the defendant was not suffering from a mental disease or defect, or else that he nevertheless had substantial capacity both to conform his conduct to the requirements of the law and to appreciate

the wrongfulness (946) of his conduct. If the Government has not established this beyond a reasonable doubt, you shall bring in a verdict of not guilty.

In considering the defense of lack of criminal responsibility or insanity, you may (947) consider the evidence that has been admitted as to the defendant's mental condition before and after the offense charged, as well as the evidence as to defendant's mental condition on that date. The evidence as to defendant's mental condition before and after that date was admitted solely for the purpose of assisting you to determine the defendant's condition on the date of the alleged offense.

[948]

The Court: (continuing) You have heard the evidence of psychiatrists who testified as expert witnesses. An expert in a particular field is permitted to give his opinion in evidence. In this connection, you are instructed that you are not bound by medical labels, definitions, or conclusions as to what is or not a mental disease. Why psychiatrists and psychologists may or may not consider a mental disease for clinical purposes where their concern is treatment, or may not be the same as mental disease for the purpose of determining criminal responsibility. Whether the defendant has a mental disease must be determined by you under the explanation of those terms as it has been given to you by the Court.

There is also testimony of lay witnesses with respect to their observations of the defendant's appearance, behavior, speech, and actions. Such persons are permitted to testify as to their own observations and other facts known to them, and may express an opinion based upon those observations and facts known to them.

In weighing the testimony of such lay witnesses you may consider the circumstances of each witness, his opportunity to observe the defendant, and to know the facts to which he has testified, his willingness and [949] capacity to expound freely as to his observations and

knowledge, the basis for his opinions and conclusions and the nearness or remoteness of his observations of the defendant in point of time to the commission of the offense charged.

You may also consider whether the witness observed extraordinary or bizarre acts performed by the defendant, or whether the witness observed the defendant conduct to be free of such extraordinary or bizarre act. In evaluating such testimony, you should take into account the extent of the witnesses observation of the defendant, and the nature and length of time of the witness' contact with the defendant. You should bear in mind that an untrained person may not be readily able to detect mental disease, and that the failure of a lay witness to observe abnormal acts by the defendant may significant only if the witness had prolonged and intimate contact with the defendant.

You are not bound by the opinions of either expert of lay witnesses. You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case, and give it such weight as you believe it is fairly entitled to receive.

[950]

You may also consider that every man is presumed to be sane, that is, to be without mental disease, and to be responsible for his acts. A presumption may, however, be overcome by evidence. You should consider these principles in the light of all the evidence in the case, and give them such weight as you believe they are fairly entitled to receive.

Where a defendant has raised the issue of his insanity, and the jury finds from the evidence in the case beyond a reasonable doubt that the accused was not insane at the time of the alleged offense, it is still the duty of the jury to consider all the evidence in the case which may aid

determination of state of mind, including all evidence offered on the issue as to insanity, in order to determine whether the defendant acted or failed to act with the requisite malice aforethought, as charged.

If the evidence in the case leaves the jury with a reasonable doubt whether the mind of the accused was capable of acting with the requisite malice aforethought to commit the crime charged, the jury should acquit the accused.

As stated before, the law never imposes upon a defendant the burden or duty of calling any witnesses or producing any evidence.

[872]

The Court: All right. Did you get what he said?

Law Clerk: I will try to get it.

Mr. Chrein: Your Honor, on the question of—One other question that we might want to resolve while we are here.

The Court: Yes.

Mr. Chrein: There is a question as to whether the evidence in this case would justify charging manslaughter to the jury. I believe Dr. Perr in his testimony did say something about the nature of the act of violence. In other words, the way he was choked.

The Court: Yes.

Mr. Chrein: Which implied something about a heat of passion. The heat of passion is the language used in the statute, I believe, but something —

The Court: Just a moment.

The Chrein: Your Honor, in any event, there was testimony from Dr. Perr, that the defendant—the manner of the killing implied a killing that was more in the nature of a heat of passion type of event.

Also, the additional evidence in the case would tend to show—I mean, if isolated and taken apart from the evidence of the grudge, which may or may not exist——

The Court: Are you looking for a lesser degree (873) charge?

Mr. Chrein: I would—My point is that I would—I would request a lesser degree charge if both degrees of manslaughter were charged. If the Court Charges one degree of manslaughter, I would just as soon proceed on the murder in the second degree.

Mr. Dawson: Voluntary manslaughter?

Mr. Chrein: Yes. The basis for the voluntary manslaughter charge would be that involuntary manslaughter has been defined as a killing done in the commission of a wrongful act that would not be a felony. The evidence—

The Court: How would you do that in this case?

Mr. Chrein: It's very simple.

The Court: Yes?

Mr. Chrein: The evidence isolated from the question of the grudge, which may or may not be a valid motive, in view of some evidence in the case that the log was being rescinded, or words to that effect, would show that the—there was an assault without a weapon on the deceased.

An assault in the maritime or territorial jurisdiction of the United States by beating, wounding or striking, is one form of misdemenor, and an assault within the maritime or territorial jurisdiction of the United States—I have Xeros sections, but I left them (874) in the courtroom—any other form is a lesser degree of a misdemeanor. If the jury could be satisfied that there was a simple assault upon Mr. Kiedinger, that resulted in his death—and if I recall, there is no weapon, no attempt to commit robbery, murder or rape.

The Court: You say kicking him in his head with a boot—I don't know if that is simple assault.

Mr. Chrein: I submit that a boot might not be a weapon.

The Court: Well,—

Mr. Dawson: I would agree that the—

The Court: If it was a baby's boot, maybe it's not

a weapon. But it was a man's boot that you wear on a ship.

Mr. Dawson: I would agree with Mr. Chrein that Dr. Perr's testimony has indicated the possibility—if the jury chooses to credit it—of a voluntary manslaughter.

The Court: Second degree.

Mr. Dawson: But the involuntary manslaughter, I don't know. I don't see—

Mr. Chrein: In this case, if the Court is not inclined to give both degrees of manslaughter I would just as soon proceed on the murder—or the murder.

Mr. Dawson: Well—

[875]

The Court: I don't want to deny you. You have a right to request the degrees. But I am trying to——What do I tell the jury about the lesser degree of manslaughter? Involuntary——

Mr. Chrein: I believe the definition of the two degrees of an assault within the maritime or territorial jurisdiction of the United States, coupled with involuntary manslaughter, is an assault—is a killing done in connection with a commission of a wrongful act, not amounting to a felony, would justify the inclusion of a charge of involuntary manslaughter.

Mr. Dawson: Well, that assault was certainly not a misdemeanor, where he said he was kicking him about the dead. Certainly not a misdemeanor.

The Court: How about the choking? This again——

Mr. Dawson: You know—and the strangling.

The Court: The strangling.

Mr. Dawson: It is clearly not a misdemeanor.

The Court: That can't be involuntary at that point. It can be a manslaughter, but it can't be involuntary.

Mr. Chrein: In that case, the defendant is making—

The Court: I don't think so.

Mr. Chrein: The defendant is making no request

for inclusion of manslaughter in this case.
[876]

The Court: Okay.

Mr. Chrein: One further——

Mr. Dawson: Before you get to that, is that your—Notwithstanding that you are not going to Charge voluntary manslaughter in any event——

The Court: No. If he doesn't want it, I won't Charge it. I think it is his prerogative as to whether or not he wants the lesser degrees. But the lesser degrees can only come from the evidence that is produced before the Court. And I can't see involuntary manslaughter—a charge of involuntary manslaughter at this time, after taking into consideration all the evidence in the case.

Mr. Chrein: I know it is not essential, but I would say very briefly for the record that this is a tactical choice. I don't——

The Court: I understand.

Mr. Chrein: I feel that—I am afraid the jury would compromise on that, rather than consider an acquittal. This is——

The Court: If you can read these jurors, or any jury,——

Mr. Chrein: I can't read a jury's mind.

The Court: Then you're better than I am.

Mr. Chrein: I told my client I might be wrong.

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Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

CAROLYN N. JOHNSON, being duly sworn, says that on the 12th day of July, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~XX~~ TWO COPIES OF THE BRIEF FOR THE APPELLEE

of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

The Legal Aid Society
Federal Services Unit, Room 509
U.S. Courthouse
Foley Square
New York, New York 10007

Sworn to before me this
12th day of July, 1976.

Sylvia E. Morris

SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 1977

Carolyn N. Johnson

CAROLYN N. JOHNSON

SIR:

PLEASE TAKE NOTICE that the within will be presented for **settlement and signature** to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19__, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19__

United States Attorney,
Attorney for _____

To:

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly **entered** herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19__

United States Attorney,
Attorney for _____

To:

Attorney for _____

Action No. _____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ is hereby admitted.
Dated: _____, 19__

Attorney for _____

FPI-LC-5M-6-73-7355

76-1083

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JAMES M. HENDRIX,

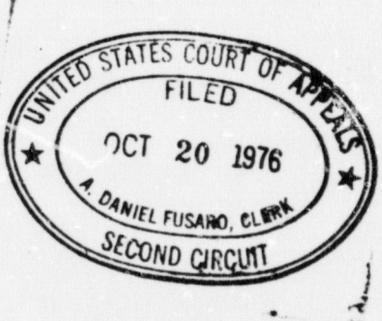
Appellant.

Docket No. 76-1083

B
P/S

PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- JAMES M. HENDRIX, Appellant.	Docket No. 76-1083

PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

This is a petition for rehearing with suggestion for rehearing en banc on the ground that the decision of the panel (VanGraafeiland, C.J.; Kelleher[1] and Gagliardi,[2] D.JJ.) misconstrued Rule 52(b) of the Federal Rules of Criminal Procedure. (A copy of the opinion is annexed hereto).

On appeal, appellant challenged his conviction, asserting that it was reversible error for the trial judge to instruct

[1]Of the United States District Court for the Central District of California, sitting by designation.

[2]Of the United States District Court for the Southern District of New York, sitting by designation.

the jury to consider the "presumption of sanity" in deciding whether the Government had proved appellant's sanity beyond a reasonable doubt.[3] The panel agreed that the instruction was error, but declined to reverse because trial counsel had failed to object.

The rationale for the decision was a per se rule that an error simply cannot be "plain" unless it is universally deemed an error. Specifically, the panel held:

> ... If this were plain error, the trial courts of the Third Circuit and the District of Columbia, as well as those in states such as New York and Massachusetts, would be routinely in error.
>
> United States v. Hendrix, slip op. 5809, 5816 (2d Cir., October 6, 1976).

This analysis is incorrect. Unanimity is not a prerequisite for determining plain error. As this Court held, sua sponte, in United States v. Alsondo, 486 F.2d 1339, 1343-1344 (2d Cir. 1973), reversed on other grounds sub nom. United

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[3] The portion of the charge at issue provided:

> You may also consider that every man is presumed to be sane, that is, to be without mental disease, and to be responsible for his acts. A presumption may, however, be overcome by evidence. You should consider these principles in the light of all the evidence in the case, and give them such weight as you believe they are fairly entitled to receive.
>
> (1014-1015).

States v. Feola, 420 U.S. 671 (1975), plain error could be found despite the conflict in the circuits on the issue of law.

Rather, the criterion is whether the claimed error adversely affected the fairness or integrity of the trial. In United States v. Atkinson, 297 U.S. 156, 160 (1936), the Supreme Court held:

> ... In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings. See New York Central R. Co. v. Johnson, 279 U.S. 310, 318; Brasfield v. United States, 262 U.S. 448, 450.

This Circuit is in accord. United States v. Vaughn, 443 F.2d 92, 94-95 (2d Cir. 1971).

Clearly, to assess the impact of the error on the outcome of the trial, the test is a factual one: the error is evaluated in terms of its relation to the issues contested at trial and the strength of the Government's case. United States v. Wharton, 433 F.2d 451, 457 (D.C. Cir. 1970). The panel's decision in this case, due to its misapprehension of the plain error rule, failed to make the requisite evaluation. Had it done so, reversal would have been assured. Appellant's sanity was the only contested issue at trial. The evidence as to insanity was strong: appellant's conduct at the time of the crime was described as "bizarre," he had a

prior history of serious mental illness, and psychiatric examination after the crime, including the evaluation of the U.S. Medical Center at Springfield, Missouri, concluded that appellant suffered from "chronic" undifferentiated schizophrenia. In contrast, the Government's proof of sanity was weak, for it was essentially only the testimony of Dr. David Abrahamsen, whose two hour-long examinations of appellant several months after the crime led him to conclude that appellant was sane.

In this context, it was critical to the outcome that the jurors were told to consider the presumption of sanity in deciding whether the Government had proved sanity behond a reasonable doubt.

The panel mistakenly relies (slip op. at 5816) on United States v. Retolaza, 398 F.2d 235 (4th Cir. 1968); United States v. Hackworth, 380 F.2d 19 (5th Cir. 1967), cert. denied, 389 U.S. 1054 (1968); and United States v. Sennett, 505 F.2d 774 (7th Cir. 1974), to hold that failure to object precludes reversal. Those cases are inapposite because the instructions challenged there merely informed the jurors of the existence of the presumption; they did not direct consideration of the presumption on the issue of sanity. In fact, the Fourth Circuit makes clear in its opinion in United States v. Retolaza, supra, 378 F.2d at 242, n.5, that it is not deciding the effect of a charge which instructs, as the trial court did here, that the presumption of sanity remains in the case.

Because the panel's decision misconstrued the plain error rule and therefore failed properly to assess the error in the context of the case, rehearing, or rehearing en banc, should be granted.

CONCLUSION

For the foregoing reasons, rehearing or rehearing en banc should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1292—September Term, 1975.

(Argued August 16, 1976 Decided October 6, 1976.)

Docket No. 76-1083

UNITED STATES OF AMERICA, *Appellee,*

v.

JAMES M. HENDRIX, *Appellant.*

Before:

VAN GRAAFEILAND, *Circuit Judge,*
KELLEHER,* and GAGLIARDI,** *District Judges.*

Appeal from a judgment following a jury trial in the United States District Court for the Eastern District of New York, Mark A. Costantino, *Judge,* convicting appellant of second degree murder in violation of 18 U.S.C. § 1111.

Affirmed.

SHEILA GINSBERG, New York, N. Y. (William J. Gallagher, The Legal Aid Society, New York, N. Y., of Counsel), *for Appellant.*

* Of the Central District of California, sitting by designation.

** Of the Southern District of New York, sitting by designation.

SAMUEL H. DAWSON, Assistant U. S. Attorney (David G. Trager, U. S. Attorney for the Eastern District of New York; Bernard J. Fried, Assistant U. S. Attorney, of Counsel), *for Appellee.*

VAN GRAAFEILAND, *Circuit Judge:*

Appellant was convicted of second degree murder under 18 U.S.C. § 1111 for the killing of a fellow crewman on the S.S. Eagle Voyager while it was docked at the port of Odessa, Union of Soviet Socialist Republics. We need not review the details of the slaying, except to state that it was a bloody and brutal affair.

Appellant's defense was premised on the claim of insanity, and it is in the court's charge relative to this defense that reversible error is claimed to have occurred. The District Judge instructed the jury correctly that the burden of proof was on the Government to establish beyond a reasonable doubt that the defendant was not suffering from a mental disease or defect and that if the Government had not established this beyond a reasonable doubt the jury was to bring in a verdict of not guilty. The court also charged, however, that every man is presumed to be sane and to be responsible for his acts. He stated further that this "assumption no longer controls when evidence is introduced that he may have a mental disease or defect". At another point in his charge, the District Judge instructed the jury it might consider that every man is presumed to be sane. He stated that this presumption might be overcome by evidence and that the jury should consider these principles in light of all the evidence in the case and give them such weight as it believed they were fairly entitled to receive. Although appellant took no exception to the charge, he now asserts that the portion

dealing with the presumption of sanity constituted plain error, mandating reversal despite the lack of objection.

When a defendant in a criminal case asserts insanity as a defense, many states place the burden of proof as to this issue upon him. *Buzynski* v. *Oliver*, 45 U.S.L.W. 2062 (1st Cir. 1976). This has long been the law of England and Canada as well. *United States* v. *Dube*, 520 F.2d 250, 255 (1st Cir. 1975). (Campbell, *J.*, concurring).

The rule in the federal courts is different. In *Davis* v. *United States*, 160 U.S. 469, 485 (1895), the Supreme Court announced that thereafter in federal prosecutions the burden would be upon the Government to establish that the defendant "belongs to a class capable of committing crime." The court then went on to say:

> If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged.

Id. at 488.

In enunciating this rule, the court quoted from the leading New York case of *Brotherton* v. *People*, 75 N.Y. 159 (1878), where the court said at 163:

> [I]f evidence is given tending to establish insanity, then the general question is presented to the court and jury whether the crime, if committed, was committed by a person responsible for his acts, and upon this question the presumption of sanity, and the evidence, are all to be considered . . . .

The courts of New York continue to follow the rule as laid down by *Brotherton*; viz., that the presumption of sanity remains as evidence until the end of the case and

the introduction of testimony in rebuttal merely presents a jury question as to whether the presumption has been overcome. *People* v. *Silver*, 33 N.Y. 2d 475, 482 (1974). Justification for this "lingering inference" is found in the common experience that most men are sane, "[s]anity being the normal and usual condition of mankind . . . ." *Id.* at 481; *see also* Richardson on Evidence § 63 (10th ed. 1973).

The history of the rule in the federal courts has been less serene. As the various circuits have struggled to arrive at a workable definition of insanity, *see, e.g., United States* v. *Freeman*, 357 F.2d 606 (2d Cir. 1966) and *United States* v. *Brawner*, 471 F.2d 969 (D.C.Cir. 1972) overruling *Durham* v. *United States*, 214 F.2d 862 (D.C.Cir. 1954), they have labored equally hard to find a resting place for the presumption of sanity. The results of their efforts in the latter area have, to say the least, been inconsistent.

The Ninth and Tenth Circuits have departed the farthest from the rule of *Davis* and *Brotherton* by holding that, where evidence of insanity is introduced, the presumption disappears like a "bursting bubble" and, being no longer in the case, is not to be mentioned to the jury. *United States* v. *Arroyave*, 465 F.2d 962, 963 (9th Cir. 1972); *cf.* *United States* v. *Ingman*, 426 F.2d 973, 976 (9th Cir. 1970); *Doyle* v. *United States*, 366 F.2d 394, 400 (9th Cir. 1966); *Davis* v. *United States*, 364 F.2d 572, 574 (10th Cir. 1966); *Otney* v. *United States*, 340 F.2d 696, 698-99 (10th Cir. 1965).

Innovations by the Fifth Circuit have been less radical. That circuit holds that, once evidence of insanity is introduced, the presumption no longer has any evidentiary value. *United States* v. *Lawrance*, 480 F.2d 688, 692-93 (5th Cir. 1973). However, no error results from the mere discussion of the presumption in the court's instructions. *United*

States v. *Hereden*, 464 F.2d 611, 612-13 (5th Cir.), *cert. denied*, 409 U.S. 1028 (1972); *United States* v. *Harper*, 450 F.2d 1032, 1037-39 (5th Cir. 1971).

The Seventh Circuit, in *United States* v. *Shapiro*, 383 F.2d 680 (7th Cir. 1967), prescribed a pattern charge which included a statement that the law presumes a defendant to be sane but that this presumption is rebuttable. In *United States* v. *Sennett*, 505 F.2d 774 (7th Cir. 1974), the court decided that henceforth it would be preferable to remove this reference from the charge but held that no substantial prejudice had occurred because it had been given.

In *United States* v. *Stolaza*, 398 F.2d 235 (4th Cir. 1968), *cert. denied*, 393 U.S. 832 (1969), the District Court had given the charge approved by the Seventh Circuit in *United States* v. *Shapiro*, *supra*, as it was incorporated in the Seventh Circuit's Manual on Jury Instructions. The Court of Appeals for the Fourth Circuit held that this charge was erroneous but that, in the absence of objection, the giving of the instruction did not constitute plain error.

The position of the First Circuit has not been clearly defined. In *United States* v. *Dube*, *supra*, 520 F.2d at 251, the majority stated that the introduction of evidence of insanity "dispels the presumption and subjects the prosecution to the burden of proving sanity beyond a reasonable doubt." Yet, Judge Campbell, in concurring, said that the jury should be entitled to consider the inference or presumption that the defendant was sane. *Id.* at 255.

The Third Circuit and the District of Columbia Circuit continue to follow the rule as laid down in *United States* v. *Davis*, *supra*. In *Gov't of Virgin Islands* v. *Bellott*, 495 F.2d 1393, 1397 (1st Cir. 1974), the court said that the jury should be instructed that there is a presumption of sanity which it may take into account along with all the

evidence in the case in determining whether the Government has proved beyond a reasonable doubt that the offense was not the consequence of a mental illness. In *Keys* v. *United States*, 346 F.2d 824, 826 (D.C.Cir.), *cert. denied*, 382 U.S. 869 (1965), then Judge Burger, speaking for the court, said:

> The presumption of sanity, whatever may be its evidentiary value and weight, does not vanish from the case, as appellant would have it. That presumption is grounded on the premise that the generality of mankind is made up of persons within the range of "normal," rational beings and can be said to be accountable or responsible for their conduct; this premise is rooted in centuries of experience, has not been undermined by contemporary medical knowledge, and justifies the continuance of the presumption after introduction of evidence of insanity.

See also Greene v. *United States*, 314 F.2d 271 (D.C. Cir. 1963); *Durham* v. *United States*, *supra*, 214 F.2d at 869.

Strangely enough, the question of whether a jury should be informed of the presumption of sanity appears never to have been decided in our own busy circuit. In *United States* v. *Currier*, 405 F.2d 1039, 1042 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969), we stated that the Government's burden to prove the defendant's sanity beyond a reasonable doubt does not arise until some evidence is introduced that will "impair" the legal presumption in favor of sanity. *See also United States* v. *Levy*, 326 F.Supp. 1285, 1297 (D. Conn.), *aff'd*, 449 F.2d 769 (2d Cir. 1971). Whether "impair" is equivalent to "destroy" was not made clear.

We have, in matters involving other presumptions, consistently held that a true presumption is a procedural

device, not evidence; and that, when proof in rebuttal is introduced, the presumption is out of the case. *See, e.g., Hudson Valley Lightweight Aggregate Corp.* v. *Windsor Building & Supply Co.*, 446 F.2d 750, 751 (2d Cir. 1971); *In re Rice's Petition*, 294 F.2d 272, 274 (2d Cir. 1961); *Seaside Improvement Co.* v. *Commissioner*, 105 F.2d 990, 993 (2d Cir.), *cert. denied*, 308 U.S. 618 (1939); *United Business Corp.* v. *Commissioner*, 62 F.2d 754, 755 (2d Cir.), *cert. denied*, 290 U.S. 635 (1933); *Alpine Forwarding Co.* v. *Pennsylvania R.R.*, 60 F.2d 734, 736 (2d Cir.), *cert. denied*, 278 U.S. 647 (1932); *United States ex rel. Schalron* v. *Pulver*, 54 F.2d 261, 263 (2d Cir. 1931); *Pariso* v. *Towse*, 45 F.2d 962, 964 (2d Cir. 1930).

This is the so-called "Thayer" rule[1] which has been adopted by the American Law Institute in its Model Code of Evidence, Rule 704(2), and is favored by most authorities in the field of evidence. *See* 9 Wigmore, Evidence § 2491 at 289 (1940); H. Weihofen, Insanity as a Defense in Criminal Law, 162 (1933); Richardson on Evidence, § 63 (10th ed. 1973); Reaugh, Presumptions and the Burden of Proof, 36 Ill. L.Rev. 703, 833 (1942); *but cf.* McCormick, Evidence § 316 at 665 et seq. (1954).

It may be that if ever guidelines for presumptions in criminal cases are agreed upon and incorporated in the Federal Rules of Evidence, some of the uncertainty which presently exists in this area will be eliminated. In the meantime, we think it would be preferable for our trial judges to follow the same procedure with the presumption of sanity that we mandate for other presumptions and refrain from mentioning it to the jury. If it is commonly accepted that most people are sane, the prosecution will suffer little from the court's failure to mention this pre-

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1 Thayer, A Preliminary Treatise on Evidence at the Common Law (1898).

sumption. More importantly, the possibility of confusion resulting from the delicate balancing of the Government's burden of proof against the presumption of sanity will be thereby eliminated.

It does not follow from this holding, however, that the reference to the presumption in this case was plain error, requiring reversal despite the lack of objection. If this were plain error, the trial courts of the Third Circuit and the District of Columbia, as well as those in states such as New York and Massachusetts, would be routinely in error. We prefer to follow the lead of such cases as *United States* v. *Retolaza*, *supra*, 398 F.2d at 242 and *Hackworth* v. *United States*, 380 F.2d 19, 21 (5th Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968) which held that, in the absence of objection, an instruction on the presumption of sanity did not constitute plain error. *See also United States* v. *Sennett*, *supra*, 505 F.2d at 778 where the court found no showing of substantial prejudice requiring reversal even though proper objection was taken. As in *Sennett*, the court below unequivocally instructed the jury that the Government had the burden of proving beyond a reasonable doubt that the defendant was sane. We see no reason, therefore, to exercise our discretionary power of reversing for plain error. *Cf. United States* v. *Indiviglio*, 352 F.2d 276, 280 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).[2]

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2 We note with interest that our own Judge Lumbard, sitting by designation in the Ninth Circuit and concurring in *United States* v. *Arroyave*, *supra*, 465 F.2d at 964, stated that if he were sitting in the Second Circuit he would vote to affirm the conviction. He said:

> Taking the charge as a whole, I believe it was clear to the jury that, if they had a reasonable doubt about Arroyave's sanity, they must acquit him. This was tantamount to requiring the government to prove beyond a reasonable doubt that Arroyave was sane at the time of the offense with which he was charged.

We think this language is equally applicable to the charge in the instant case.

Appellant's remaining assertions of error may be quickly disposed of. Defense counsel requested that the jurors be given three choices for their verdict: guilty, not guilty or not guilty by reason of insanity. The District Judge's refusal to submit the third alternative was not error. *United States* v. *Barrera*, 486 F.2d 333, 339 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974).

Defense counsel also requested that the jury be charged on the lesser included offenses of voluntary and involuntary manslaughter. When the court indicated its willingness to charge only on voluntary manslaughter, defense counsel opted to proceed on the murder charge alone. A defendant is entitled to a charge on a lesser included offense only if the evidence warrants it. *United States* v. *Carroll*, 510 F.2d 507, 509 (2d Cir. 1975). In view of the undisputed testimony that the deceased was brutally kicked and strangled to death, we see no error in the court's refusal to charge involuntary manslaughter.

The judgment of conviction is affirmed.

CERTIFICATE OF SERVICE

October 20, 1976

I certify that a copy of this petition for rehearing with suggestion for rehearing en banc has been mailed to the United States Attorney for the Eastern District of New York.

Sheila Ginsberg

B
Pgs

76-1083

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

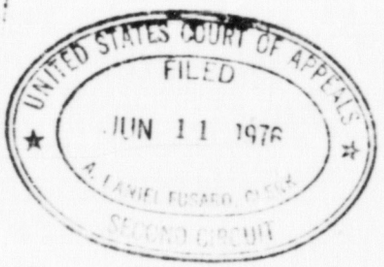
JAMES M. HENDRIX,

Defendant-Appellant.

Docket No. 76-1083

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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SHEILA GINSBERG,
Of Counsel.

PEAL ... 100

75CR 54

CRIMINAL DOCKET

COSTANTINO, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.: DAWSON
vs.	
JAMES M. HENDRIX	
	For Defendant:

Murder within Maritime Jurisdiction

ABSTRACT OF COSTS	AMOUNT		DATE	NAME	RECEIVED		DISBURSED
Fine,			2/26/76	[illegible] (Ref)			
Clerk,							
Marshal,							
Attorney,							
Commissioner's Court,							
Witnesses,							

DATE	PROCEEDINGS
1/21/75	Before DOOLING, J.- Indictment filed
1-28-75	Before COSTANTINO J - case called - deft & atty Simon Chrein of Legal Aid present - deft arraigned and enters a plea of not guilty - case adjd to 3-14-75 - for all purposes. Motion for psychiatric examination - motion granted-submit Order.
1-29-75	By COSTANTINO J - Order filed that the deft be committed to Medical Center for Federal Prisoners, Springfield, Mo. to be examined as to his mental condition for a period not to exceed 60 days and that a report be rendered to the Hon.Judge Mark Costantino and copies of said report be sent to attys as indicated in order and U.S. Attorneys office and after examination has been completed, the deft., if sane, shall be returned to the custody of the U.S.Marshal.

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
1-30-75	Govts Notice of Readiness for Trial filed		
1/31/75	Certified copy of order of 1/29/75 retd and filed- copies mailed to Federal Detention Headquartes		
2-21-75	Order filed -retd executed-deft delivered to Medical Center for Federal Prisoners, Springfield, Mo.		
3/14/75	Before COSTANTINO,J.- Case called- Deft not present- case adjd to 4/14/75 at 10:00 A.M. for all purposes		
4-4-75	~~see entry on docket page D for correct information~~		
4-7-75	By COSTANTINO J - Order filed that Dr.Irwin Perr be admitted to Federal Detention Headquarters, 427 West St., NYC. for the purpose of interviewing the defendant. Copy to Mr.Chrein of Legal Aid.		
4-14-75	Before COSTANTINO J - case called - deft & atty S.Chrein of Legal Aid present - case adjd to May 16, 1975 for all purposes - motion for reduction of bail - bail reduced to $200,000.00		
5-2-75	Before COSTANTINO J - case called - deft & atty S. Chrein present - Case set down for trial on June 16, 1975		
5-5-75	By COSTANTINO J - Order filed that a psychiatrist hereinafter designated by the Govt be permitted to examine the deft at Federal Det. Headquarters and further ORDERED that such psychiatrist designated by the Govt shall be permitted to employ such tests and examinations as are necessary, etc. Copies to Marshal.		
5-16-75	Before COSTANTINO J - case called & adjd to June 16, 1975 for trial		
6/12/75	Stenographers Transcript dated 5/2/75 filed		
6/12/75	Before COSTANTINO,J.- Case called- Case adjd to 6/30/75 at 10:00 AM. for trial		
6/30/75	Before COSTANTINO,J.- Case called- Deft and counsel present- Trial ordered and begun-jurors selected and sworn-Trial contd to 7/1/75 at 10:30 A.M.		
7/2/75	Before COSTANTINO,J.- Case called- Deft and counsel present-Trial resumed contd to 7/3/75		
7-3-75	Before COSTANTINO J - case called - deft & counsel present - trial resumed - trial contd to 7-2-75.		
7-2-75	Before COSTANTINO J - case called - deft & counsel present -trial resumed -Trial contd to 7-3-75.		
7/3/75	Before COSTANTINO,J.- Case called- Deft and counsel present-Trial resumed Trial contd to 7/10/75 at 10:00 A.M.		
7/7/75	Before COSTANTINO,J.- Case called- Deft and counsel present- Trial resumed Trial contd to 7/8/75 at 10:30 A.M.		
7/8/75	Before COSTANTINO,J.- Case called- Deft and counsel present- Trial resumed Motion to dismiss and judgment of acquittal denied-trial contd to 7/9/75		

75 CR 54

CRIMINAL DOCKET

DATE	PROCEEDINGS
7/9/75	Before COSTANTINO,J. Case called- Deft and counsel present-Trial
	Both sides rest-court charges jury-jury retires to deliberate-tria
	to 7/10/75
7/9/75	By COSTANTINO,J.- Orders of sustenance ~~and transportati~~ transportati
	lodging filed(4)
7/10/75	Before COSTANTINO,J.- Case called- Deft and counsel present-Tria
	sumed-jury deliberations contd-Trial contd to 7/11/75
7/10/75	By COSTANTINO,J.- Orders of sustenance,lodging, and transportati
7/11/75	Before COSTANTINO,J.- Case called- Deft and counsel present- Tri
	ed- Jury continues deliberations-Court withdraws juror No. 1 and d
	a mistrial- adjd to 7/31/75 at 10:00 A.M. for status report-b
7/14/75	By COSTANTINO,J.- Orders of sustenance filed(3)
7/14/75	Stenographers Transcripts dated 6/30/75,7/1/75, 7/2/75, 7/3/75,
	7/8/75, 7/9/75, 7/10/75 and 7/11/75 filed
7/15/75	By MISHLER CH.J.- Order filed that Agustus F. Kinzel be permitted
	visit and interview the defendant at his place of incarceration
7-17-75	Voucher for compensation for Expert Services filed. (HENDRIX)
7-24-75	By COSTANTINO J - Order filed that the U.S.Marshal is directed
	pay to Kenneth J. Gould the sum of $15.34 to reimburse him for
	out of pocket expenses (a receipt for which is attached) for the
	jury in United States v.Hendrix.
7-31-75	Before COSTANTINO J - case called - deft Hendrix & counsel
	Simon Chrein of Legal Aid present - adjd to 9-16-75 for trial.
9-17-75	Before COSTANTINO J - case called - deft Hendrix & counsel
	Simon Chrein of Legal Aid present - Trial ordered and BEGUN-
	Jurors selected and sworn - trial contd to 9-18-75.
9/18/75	Before COSTANTINO,J.- Case called- Deft and counsel present-Trial
	Trial contd to 9/19/75 at 11:30 A.M.
9-19-75	Before COSTANTINO J - case called - deft & atty present - trial
	resumed - trial contd to 9-22-75 at 11:00 am.
9/23/75	Before COSTANTINO,J.- Case called- Deft and counsel present-Tri
	sumed-Govt rests-deft's motion to dismiss and for judgment of ac
	denied- trail contd to 9/24/75 at 10:00 A.M.
9-24-75	Before COSTANTINO J - case called - deft & atty present -
	trial resumed - trial contd to 9-25-75 at 9:30 am.
9-25-75	Before COSTANTINO J - case called - deft & atty present - trial
	resumed - Trial contd to 9-23-75

D. C. 109

DATE	PROCEEDINGS
9-25-75	Before COSTANTINO J - case called - deft & atty present - trial resumed - trial contd to 9-26-75 at 9:30 am.
9-26-75	Before COSTANTINO J - case called - deft & atty present - trial resumed - Trial contd to 9-29-75.
9/29/75	Before COSTANTINO,J.- Case called- Deft and counsel present- Trial resume jury retires to deliberate-jury returns and renders a verdict of guilty jury polled- and discharged- motion to set aside verdict denied- deft sentenced for sutdy and report pursuant to T-18, U.S.C. Sec. 4208(a)(2)
9/29/75	By COSTANTINO,J.- Order of sustenance filed
9/29/75	Judgment and Commitment filed- certified copies to Marshal
9/29/75	Stenographers Transcript dated September 16,17,18,19,22,23,24,25,26 file
10-1-75	Stenographers transcript filed dated 9-29-75.
10-2-75	Certified copy of Judgment & Commitment retd and filed - ~~deft~~ copies ~~delivered~~ to MCC, NY
4-4-75	By COSTANTINO J - Order filed that the deft be committed to Kings County Hospital, Brooklyn, N.Y. to be examined as to his mental condition etc. and that when such examination shall have been completed the deft shall be returned to the custody of the U.S.Marshal. (copies to Marshal) this entry inadvertently numbered (file number) incorrectly by the U.S. Attorneys office
10-20-75	Voucher for Expert Services filed
12/29/75	Letter from deft dated 12/12/75 filed
12/31/75	By COSTANTINO,J.- Memorandum and Order filed in regard to request by def for certain documents
2-20-76	Before COSTANTINO J - case called - deft & counsel S.Chrein present. Deft sentenced to imprisonment for 9 years. , and is to receive treatment for his mental condition during his incarceration. Notice of Appeal to be filed in forma pauperis by the Clerk.
2-20-76	Judgment & Commitment filed - certified copies to Marshal.
2-20-76	Notice of Appeal filed (no fee)
2-20-76	Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals.
2/25/76	Certified copy of Judgment and Commitment retd and filed- deft delivere to MCC
3/8/76	Copy of Order received from court of appeals that record be filed on or before 3/24/76
3-12-75	Notice of motion filed pursuant to Rule 35 for reduction of sentence etc
3/16/76	By COSTANTINO,J.-Memorandum and Order filed denying above motion

RJD:SHD:da
F.#751028

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

JAMES M. HENDRIX,

Defendant.

- - - - - - - - - - - - - - - - - X

75CR 54

INDICTMENT

Cr. No.
(T. 18, U.S.C. §§1111, 7 and 3238)

B

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

JAN 21 1975

TIME A.M.
P.M.

THE GRAND JURY CHARGES:

1. On or about the 30th day of December 1974, on board the S. S. Eagle Voyager, a vessel belonging in whole to the Sea Transport Corporation, a corporation created by and under the laws of the State of Delaware, while the said vessel was within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, that is, on board the S. S. Eagle Voyager while docked at the Port of Odessa, Union of Soviet Socialist Republics, the defendant JAMES M. HENDRIX, with malice aforethought and by means of manual strangulation did murder Robert E. Kiedinger. (Title 18, United States Code, Section 1111).

2. The Eastern District of New York is the federal judicial district into which the defendant JAMES M. HENDRIX was first brought following commission of the aforesaid offense. (Title 18, United States Code, Sections 7 and 3238).

A TRUE BILL

FOREMAN.

THE COURT: Mr. Foreman, ladies and gentlemen of the jury:

We now come to the final stage of the proceedings. The Court will now charge you on the law to be applied to the facts in the case.

As you may recall, I initially gave you a pre-charge as to the manner in which the case would be presented to you. I told you that most of the evidence in the case would come in the form of the testimony of witnesses, and that you were to pay special attention to the manner in which the witnesses testified.

I believe I also instructed you that you would be the judges of the facts in the case, that being

your sole province; and that your recollection of the facts after having heard all of the evidence in the case -- the testimony of witnesses and the documentary proof -- was to control the determination of the issues.

Likewise at that time I told you that I would be the judge of the law. This has not changed at this stage of the proceedings. I will not review the facts in this case for you because I am certain that with summations by the attorneys there is no need for the Court to review the facts. In any event, if you find that there is some fact in the case that you may have forgotten or don't recollect, or you can't agree with each other in your deliberations, you can have it read back from the record, and that will, I am sure, refresh your memory.

In any event, I am the judge of the law. You must accept what I say to be the law in this case.

Now the attorneys have been permitted by the Court and by the rules to make opening statements and summations to you. Under no circumstances are the statements they have made by way of opening or by way of summation to be taken as evidence. However the Court and the law does permit you to take

the arguments that they have proffered before you and weigh those arguments. And if you agree with what they have said on either side of the case you may use those arguments in your deliberations and in discussing the case with each other, and try to convince one another as to what the final determination shall be with reference to the deliberations at hand.

If you feel that the arguments are not commensurate with the testimony and the proof in the case, you may disregard them. The arguments are not evidence. You need not weigh them. However, there are times when the arguments of the attorneys will give you an insight as to something you may have missed, and you may discuss that portion of it if you so desire.

Now, of course, I also said to you that during the trial, the Court will be the judge of the law. Likewise, as to motions which at times we had at a side bar, as you may recall. That was not for the purpose of keeping any of the proof from you, but were matters of law that were discussed between the attorneys and the Court itself and should not have come before you.

In any event, if you feel that you have discovered by some stretch of your imagination what this Court thinks as to either some of the testimony or the case itself, you should remove that from your mind because I tell you here and now I have come to no conclusion in this case nor have I indicated to you in any way whatsoever what my feeling is with reference to the facts in the case of with reference to the guilt or innocence of the defendant. That is your province and your job. You should not try to weigh what you believe the Court's impression may be.

You must understand that the lawyers who appear before you are advocates. They are advocating the best case they can for the parties they represent and they have a right to exercise as much forcefulness as they desire in their questioning or otherwise in presenting their case. I say this because this is within the framework of the ordinary trial.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the "Not-Guilty" plea of the accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be

governed by sympathy, prejudice or bias. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court and reach a just verdict, regardless of the consequences.

During my pre-charge I told you among other things that the questions asked by the attorneys are never to be considered as evidence even though the question may contain a statement of evidence. You are reminded that only the answer to the question is evidence, if, of course, the question was answered.

Of course you know by this time that this case has come before you by way of an indictment presented by a Grand Jury sitting in this Eastern District. That indictment charges the defendant with the court I shall now read to you: Remember, the indictment is merely an accusation, merely a piece of paper. It is not evidence and is not proof of anything.

The indictment reads:

"On or about the 30th day of December, 1974, on board the S.S. EAGLE VOYAGER, a vessel belonging in whole to the Sea Transport Corporation, a corporation created by and under the laws of the

State of Delaware, while the said vessel was within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, that is, on board the S.S. EAGLE VOYAGER while docked at the Port of Odessa, Union of Soviet Socialist Republics, the defendant, James M. Hendrix, with malice aforethought and by means of manual strangulation did murder Robert E. Kiedinger." Title 18, United States Code, Section 1111.

"The Eastern District of New York is the Federal judicial district into which the defendant James M. Hendrix was first brought following commission of the aforesaid offense." Title 18, United States Code, Sections 7 and 3238.

18 United States Code, Section 1111 states in pertinent part as follows:

Murder in the second degree is the unlawful killing of a human being with malice aforethought.

Two essential elements are required to be proved in order to establish the offense of second degree murder charged in the indictment:

First: The act of killing a human being unlawfully;

Second: Doing such act with malice

aforethought.

The burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

"Unlawfully" means contrary to law. So, to do an act unlawfully means to do willfully something which is contrary to law.

An act is done willfully if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

Malice aforethought is a state of mind showing a heart regardless of the life and safety of another.

Malice aforethought may also be defined as the condition of mind which prompts a person to do willfully, that is, on purpose, without adequate provocation, justification, or excuse, a wrongful act whose foreseeable consequence is death or serious bodily injury. Malice aforethought does not necessarily imply any ill will, spite or hatred towards the individual killed. In determining whether a wrongful act is done with malice aforethought, you

may infer that a person ordinarily intends the natural and probable consequences of acts knowingly done. In determining whether the defendant acted with malice aforethought, however, you should consider all facts and circumstances preceding, surrounding and following the killing; as shown by the evidence in this case, which tend to shed light upon the condition of mind and heart of the killer before and at the time of the deed.

Stated differently, malice aforethought means an intent at the time of the killing, willfully to take the life of a human being or an intent to act in callous and wanton disregard of the consequences to human life.

The defendant in this case asserts the defense of insanity.

You are not to consider this defense unless you have first found that the Government has proved beyond a reasonable doubt each essential element of the offense. One of these elements is the requirement of malice aforethought, on which you have already been instructed. In determining whether that requirement has been proved beyond a reasonable doubt, you may consider the testimony as to the defendant's abnormal

mental condition.

If you find that the Government has failed to prove beyond a reasonable doubt any one or more of the essential elements of the offense, you must find the defendant not guilty.

If, however, you find that the Government has proved each essential element of the offense beyond a reasonable doubt, then you must consider the defense of lack of criminal responsibility, or as it is sometimes called, the defense of insanity.

The law provides that a jury shall bring in a verdict of not guilty if the following test is met: The defendant must be found not guilty if, at the time of the criminal conduct, the defendant, as a result of mental disease, either lacked substantial capacity to conform his conduct to the requirements of the law, or lacked substantial capacity to appreciate the wrongfulness of his conduct.

A defendant who is intellectually aware that his act is wrongful is not responsible for that act if he does not appreciate the wrongfulness of that act because mere intellectual awareness that conduct is wrongful, when divorced from appreciation or understanding of the moral or legal import of behavior can

have little significance.

Every man is presumed to be sane, that is, to be without mental disease or defect, and to be responsible for his acts. But that assumption no longer controls when evidence is introduced that he may have a mental disease or defect.

The defense of lack of criminal responsibility, or as it is sometimes called, the defense of "insanity" does not require a showing that the defendant was disoriented as to time or place.

Mental disease includes any abnormal condition of the mind, regardless of its mental label, which substantially affects mental or emotional processes and substantially impairs behavior controls. The term "behavior controls" refers to the processes and capacity of a person to regulate and control his conduct and his actions.

In considering whether the defendant had a mental disease at the time of the unlawful act with which he is charged, you may consider testimony in this case concerning the development, adaptation and functioning of these mental and emotional processes and behavior controls.

The burden is on the Government to prove

beyond a reasonable doubt either that the defendant was not suffering from a mental disease or defect, or else that he nevertheless had substantial capacity both to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct. If the Government has not established this beyond a reasonable doubt, you shall bring in a verdict of not guilty.

In considering the defense of lack of criminal responsibility or insanity, you may consider the evidence that has been admitted as to the defendant's mental condition before and after the offense charged, as well as the evidence as to defendant's mental condition on that date. The evidence as to defendant's mental condition before and after that date was admitted solely for the purpose of assisting you to determine the defendant's condition on the date of the alleged offense.

(continued on next page)

Simon
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follows

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THE COURT: (continuing) You have heard the evidence of psychiatrists who testified as expert witnesses. An expert in a particular field is permitted to give his opinion in evidence. In this connection, you are instructed that you are not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease. Why psychiatrists and psychologists may or may not consider a mental disease for clinical purposes where their concern is treatment, may or may not be the same as mental disease for the purpose of determining criminal responsibility. Whether the defendant has a mental disease must be determined by you under the explanation of those terms as it has been given to you by the Court.

There is also testimony of lay witnesses with respect to their observations of the defendant's appearance, behavior, speech, and actions. Such persons are permitted to testify as to their own observations and other facts known to them, and may express an opinion based upon those observations and facts known to them.

In weighing the testimony of such lay witnesses, you may consider the circumstances of each witness, his opportunity to observe the defendant, and to know the facts to which he has testified, his willingness

and capacity to expound freely as to his observations and knowledge, the basis for his opinions and conclusions, and the nearness or remoteness of his observations of the defendant in point of time to the commission of the offense charged.

You may also consider whether the witness observed extraordinary or bizarre acts performed by the defendant, or whether the witness observed the defendant's conduct to be free of such extraordinary or bizarre acts. In evaluating such testimony, you should take into account the extent of the witnesses' observation of the defendant, and the nature and length of time of the witnesses' contact with the defendant. You should bear in mind that an untrained person may not be readily able to detect mental disease, and that the failure of a lay witness to observe abnormal acts by the defendnat may be significant only if the witness had prolonged and intimate contact with the defendant.

You are not bound by the opinions of either expert or lay witnesses. You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case, and

give it such weight as you believeit is fairly entitled to receive.

You may also consider that every man is presumed to be sane, that is, to be without mental disease, and to be responsible for his acts. A presumption may, however, be overcome by evidence. You should consider these principles in the light of all the evidence in the case, and give them such weight as you believe they are fairly entitled to receive.

Where a defendant has raised the issue of his insanity, and the jury finds from the evidence in the case beyond a reasonable doubt that the accused was not insane at the time of the alleged offense, it is still the duty of the jury to consider all the evidence in the case which may aid determination of state of mind, including all evidence offered on the issue as to insanity, in order to determine whether the defendant acted or failed to act with the requisite malice aforethought, as charged.

If the evidence in the case leaves the jury with a reasonable doubt whether the mind of the accused was capable of acting with the requisite malice aforethought to commit the crime charged, the jury should acquit the accused.

As stated before, the law never imposes upon a defendant the burden or duty of calling any witnesses or producing any evidence.

There is evidence in this case tending to show that the defendant was intoxicated prior to and at the time of the alleged commission of the homicide.

If you find beyond a reasonable doubt that the defendant was sane at the time of the crime, then the fact that he may have been intoxiated does not relieve the defendant of any criminal responsibility.

You have also heard testimony that the defendant smoked hashish. You should weigh such evidence only as it bears on the crime charged in the indictment which I have read to you and only that crime. The defendant does not stand accused of a drug charge.

You may hear me sometimes refer to direct evidence and to circumstantial evidence, and it is well to explain now the difference between these two types of evidence.

Direct evidence is where a witness testified to what he saw, heard or observed, what he knows of his own knowledge, something which comes to him by virtue of his senses.

Circumstantial evidence is evidence of facts

and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind. Stated somewhat differently, circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a logical tendency to lead the mind to a conclusion that those facts exist which are sought to be established.

Circumstantial evidence, if believed, is of no less value than direct evidence, for in either case you must be convinced beyond a reasonable doubt of the guilt of a defendant.

A defendant is presumed innocent of the crime. Thus, the defendant, although accused, begins the trial with a clean slate and with no evidence against him, and the law permits nothing but legal evidence to be presented before a jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless you, the jury, are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt, and reasonable doubt is doubt based

upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

You, the jury, will remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses, or producing any evidence. If the jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, you, the jury, must, of course, adopt a conclusion of innocence.

I have said that the defendant may be proven guilty either by direct or circumstantial evidence. I have said that direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eye-witness. Also, circumstantial evidence is proof of a chain of facts and circumstances, indicating the guilt or innocence of a defendant. You, the jury, may make

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common sense inferences from the proven facts.

It is not necessary that all inferences drawn from the facts in evidence be consistent only with guilt, and inconsistent with every reasonable hypothesis of innocence. The test is one of reasonable doubt, and should be based upon all the evidence, the testimony of the witnesses, the documents offered into evidence, and the reasonable inferences which can be drawn from the proven facts.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from the facts which have been proved. You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from the facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof.

Charge of the Court

You as jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves, and it goes without saying that you should scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and his demeanor and manner while on the stand. Consider the witness' ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might b e affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently, and innocent misrecollection, like failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance, or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

As to making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

When a defendant in a case of this kind takes the stand, which he has a perfect right to do, he is subjected to all the obligations of witnesses, and his testimony is to be treated like the testimony of any other witness; that is to say, it will be for you to say, remembering the substance of his testimony, the manner in which he gave it, his cross-examination, and everything else in the case, whether or not he told the truth. Then, again, it is for you to remember, you have a perfect right to do so, the very grave interest the defendant has in the case. As he places himself as a witness, he stands like any other witness.

Evidence that at some other time a witness, other than the accused, has said or done something, or has failed to say or do something, which is inconsistent with the witness' testimony at the trial, may be considered by the jury for the sole purpose of judging

the credibility of the witness; but may never be considered as evidence or proof of the truth of any such statement.

Where a witness is a defendant on trial in the case, and, by such statements or other conduct, the defendant admits some fact against his interest, then the statement or other conduct, if knowingly made or done, may be considered as evidence of the truth of the fact so admitted, as well as for the purpose of judging the credibility of the defendant as a witness.

An act or omission is "knowingly" done if done voluntarily and intentionally, not because of mistake or accident, or other innocent reason.

Every witness' testimony must be weighed as to its truthfulness. If you find any witness lied as to any material fact in the case, then the law gives you certain privileges. One of those privileges is that you have the right to disregard the entire testimony of that witness. If you find, however, that you can sift through that testimony and determine which of the testimony was true and which was false, then the law allows you to take the portions which were true and weight it, and disregard those portions which were false. That again is witnin your prerogative.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

You are not obliged to accept testimony, even though the testimony is uncontradicted and the witness is not impeached. You may decide, because of the witness' bearing and demeanor, or because of the inherent improbability of his testimony, or for other reasons sufficient to you that such teatimony is not worthy of belief.

The Government is not required to prove the essential elements of the offense as defined in these instructions by any particular number of witnesses. The testimony of a single witness may be sufficient to convince you beyond a reasonable doubt of the existence of an essential element of the offense charged, if you believe beyond a reasonable doubt that the witness is telling the truth.

Testimony was introduced as to the defendant's

mental condition at the time of the commission of the crime. A layman may give an opinion on the issue of insanity only on the basis of facts known to him. An expert, however, may base his opinion on the facts which he has observed, or on the facts which he has heard others relate, or on hypothetical facts based on the evidence.

Expert testimony on the issue of the defendant's sanity is not binding on the jury, and you may reach a contrary conclusion on the basis of other evidence in the case. You should, however, consider it together with all the other evidence in the case in determining the defendant's mental condition at the time of the commission of the crime charged in the indictment.

There is nothing peculiarly different in the way a jury should consider the evidence in a criminal case, from that which all reasonable persons treat any question, depending upon evidence presented to them. You are expected to use your good senses; consider the evidence in the case for only those purposes for which it has been admitted, and give it a reasonable and fair construction, in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If an accused be proved guilty beyond reasonab le

doubt, say so. If not proved guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict of guilty upon anything other than the evidence in the case; and remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

In making the factual determination on which your verdict will be based, you may consider only the exhibits which have been admitted in evidence, and the testimony of the witnesses as you have heard it in this courtroom.

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court, and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

Now, in this type of case there must be a unanimous verdict. That means all twelve of you must agree, and it goes without saying that it becomes incumbent upon you to listen to one another, and to argue out the points among yourselves in order to determine in good conscience whether your fellow jurors'

argument is one commensurate with yours, or whether at least you can with good conscience agree with him. You have no right to stubbornly or idly sit by and say, "I'm not talking to anyone," "I am not going to discuss it," because people with common sense and the ability to reason must communicate. They must communicate their thoughts. So, anything which appears in the record, and about which one of you may not agree -- talk it out amongst yourselves, and then if you can't agree as to what is in the record, well, you can ask the Court to have that portion of the testimony read back to you. You may do so by knocking on the door and giving a note in writing to the clerk, who will then present it to the Court, and I will then bring you into the courtroom.

If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

You, Juror No. 1, are the Foreman. You will preside over the deliberations, and you will be the spokesman here in court.

You have the following forms of verdict which you can bring in this case. It being a one count

indictment, the form of your verdict will be:

If you f. the defendant not guilty, the form of your verdict is, "We, the jury, find the defendant not guilty."

If you find the defendant guilty, you may announce it as, "We, the jury, find the defendant guilty."

Those are the two forms of verdict.

(continued next page)

That is the Court's charge at this time. The marchals will now be sworn and they will take you to the deliberating room.

(The marshal was thereupon sworn by the deputy clerk of the courtroom.)

THE COURT: All right, Mr. Foreman, ladies and gentlemen of the jury, follow the marshal.

Oh, the alternates at this time. Bring them back. Just one second.

(The jury having partially left the courtroom thereupon returned to the courtroom.)

THE COURT: I have two thoughts at this time. The first thought is that the alternates must be discharged and no longer go into the jury room with the prime jury of twelve people who were chosen.

My second thought is since it is 12:00 o'clock I am going to have you go out to lunch and in this way you will have missed most of the rush in the restaurants, and then have you brought back and at that time deliberate. While you are lunch do not discuss the case in public. Wait until you get back to the jury room to discuss it, any part of it.

In addition I will permit the two alternates to go to lunch with you on condition that the case is

not discussed at lunch.

Immediately after lunch the two alternates will be discharged and they need not come back to the jury room or the courtroom. Your jury service will then be recognized. Okay. Do not discuss the case at this time.

(The jury thereupon retired from the courtroom at 12:00 o'clock noon.)

MR. CHREIN: Your Honor, if jury asks to see specific exhibits such as the Government's hashish or the statement --

THE COURT: No, the hashish will not be permitted to go into the jury room.

MR. CHREIN: No. But I was thinking more in terms of the statement. Is there any reason why I shouldn't leave these documents with the Clerk?

THE COURT: No. Leave them with us. We will make a ruling at this time that any of the exhibits with the exception of the hashish which has been marked in evidence will be submitted to the jury if they request them.

MR. CHREIN: Without the need of summoning counsel.

THE COURT: Without the need of summoning counsel.

MR. DAWSON: I have my folder here containing all the Government exhibits (indicating).

THE COURT: We will look through the exhibits and if they request them they will be sent in.

MR. CHREIN: I will leave these four exhibits with the Clerk. Will you take them, Harold?

THE DEPUTY CLERK: Yes.

THE COURT: They won't be back until about 2:00 in any event.

MR. CHREIN: Should I be required, and if I am not here, a call to my office will get me.

THE COURT: By the way, there were no exceptions to the charge.

MR. CHREIN: No exceptions.

MR. DAWSON: No exceptions.

(At 12:45 o'clock p.m. a recess was thereupon taken until 2:00 p.m.)

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A F T E R N O O N S E S S I O N

(The jury thereupon returned to the courtroom at 3:15 p.m.)

(Jury note referred to was received and marked Court's Exhibit 1.)

THE COURT: All right, good afternoon. I received a note marked Court's Exhibit 1 now:

"Required testimony psychological report of Dr. Taub, Rutgers University while defendant was in detention (recently)," signed by the Foreman.

There is no testimony by Dr. Taub, or there are no papers in evidence by Dr. Taub or anyone connected with Rutgers University about the defendant.

Now, you will recall I said that papers that are marked for identification are not permitted to be seen by the jury.

THE FOREMAN: This was remembered in the arguments.

THE COURT: If there was reference to a Dr. Taub who examined him in Springfield, if that is what you are talking about, it is not in evidence. The reference is in evidence that there has been some discussion. But there was no report by him that was in evidence that you can look at.

THE FOREMAN: Could we hear the testimony

relating to the reference?

THE COURT: You can hear that. We will try to find it now.

Are you going to stay there and wait for a few minutes while we see if we can locate it?

MR. CHREIN: Your Honor, could the jury go back?

THE COURT: Well, we may need discussion about it to agree as to which part of it you will hear. The testimony relating to Dr. Taub?

THE FOREMAN: It was quoted by one of the psychiatrists.

THE COURT: Yes, Dr. Kinzel.

(The jury thereupon retired from the courtroom.)

MR. CHREIN: Just one question, your Honor. I think since the jury characterized Dr. Taub from Rutgers --

THE COURT: They don't characterize him from Rutgers. Dr. Taub, Rutgers U, whatever that was, while the defendant was in detention. I don't know what that means.

MR. CHREIN: Dr. Perr was from Rutgers.

THE COURT: They said Dr. Taub. We will stay with him now.

MR. CHREIN: Perhaps we can have that matter

cleared up.

THE COURT: How can you clear that up? They volunteered it to me. I didn't ask them. They want Dr. Taub.

MR. DAWSON: Can we have a moment to look for it?

THE COURT: I think it was the next to the last day.

I have something on page 717:

"I'm going to show you defendant's Exhibit U for Identification, which is a report on the stationery of the College of Medicine and Dentistry, Rutgers Medical School, signed by Irving M. Pia, and I ask you if you have seen that in connection with your studies in this case."

MR. DAWSON: That is not the same. I think it came about on my cross-examination of Dr. Kinzel.

THE COURT: That was the next day. I think so, too.

MR. DAWSON: I have gotten up to 792 without reference to any doctor.

MR. CHREIN: I think it is on 796.

THE COURT: There was something about it. It didn't mention his name yet.

MR. CHREIN: He is being shown the report from

Springfield at that point.

THE COURT: Yes. Let's see now. 798: "Is there anything else in this report, Doctor?"

He is talking about a psychologist. He gave the definition of psychologist. I do not see his name yet.

All right, 802:

"All you aware of what is that gentleman's name, Dr. Taub." At the bottom of the page, twenty-four:

"Are you aware of having read his report?

"Yes."

And let's see now.

MR. DAWSON: 803 on top.

THE COURT: Yes. That he said in his opinion the defendant was making every effort to appear psychotic and he questioned defendant's motive for trying to give him that appearance. Right.

MR. DAWSON: Then we have the answer.

THE COURT: That is what he said, yes.

Then that is answered.

Now then you go down to the witness'having a number of problems with this report --

MR. DAWSON: I think that is all I asked him.

THE COURT: That is all.

Your Honor, can I just see if the matter was gone into on redirect.

THE COURT: Yes. That was that. Redirect starts on 839 or 840. All right, now the first question -- the first page is Dr. Perr.

MR. CHREIN: On 845.

THE COURT: Yes, I see it.

MR. DAWSON: That was objected to and sustained.

MR. CHREIN: I understand that.

MR. DAWSON: It was objected to and sustained.

MR. CHREIN: Your Honor, I would request --

MR. DAWSON: Just a moment. Let me read through.

THE COURT: Down at the bottom.

MR. DAWSON: Which page, Judge?

THE COURT: The same page:

"Doctor, does the report of Dr. Taub -- does the conclusion of Dr. Taub recommend that the defendant be brought back for trial or recommend treatment before trial."

That was sustained likewise. I think you dropped it at that.

MR. DAWSON: I think that is all there is.

THE COURT: We had better make sure.

MR. DAWSON: That is it.

MR. CHREIN: Can I ask this question, after reading the material from Dr. Taub, which is that one question and answer, would the Court -- since they seem to be interested in the defendant's condition at Springfield -- would the Court ask if that is all they want from the Springfield report. And it doesn't necessarily invite comment --

THE COURT: There is nothing else. What am I going to ask them?

MR. DAWSON: We can only respond to specific questions.

THE COURT: It is where the evidence is now. I can't respond to anything else.

MR. DAWSON: I think the bottom of 802 and top of 803 is the only reference to Dr. Taub.

THE COURT: Other questions were sustained. I think it is fair to say that.

MR. DAWSON: Yes.

THE COURT: Questions on redirect were sustained.

MR. CHREIN: What line does the Court intend to have read back? From what point?

THE COURT: There is only one place.

MR. DAWSON: Line 25 on page 802 up to line 5 on page 803.

THE COURT: That is all.

MR. CHREIN: In other words, I would submit that perhaps we ought to identify who the psychologist is.

THE COURT: All right, we will start with line 20. O.K. Now did you say senior psychologist? Are you aware of what that gentleman's name is, Doctor? That will follow in sequence.

MR. DAWSON: Yes.

THE COURT: Bring in the jury.

(The jury thereupon returned to the courtroom at 3:26 p.m.)

THE COURT: We have found the one place and we will have it read to you.

(The reporter thereupon read from line 20 at page 802 to line 5, page 803.)

THE COURT: That is all there is reference to Dr. Taub. There were other questions asked on redirect but the objections to the questions were sustained. And where it is sustained it is not in evidence so that you need not consider it.

(The jury thereupon retired from the courtroom at 3:28 p.m.)

(Continued on next page.)

DS:GA
TRIPM 2

(The following occurred at 4:30 o'clock P.M.)

THE COURT: All right, bring in the jury.

THE CLERK: Jury note, marked as Court Exhibit number 2.

(Document referred to was received and marked Court's Exhibit number 2.)

THE CLERK: Mr. Foreman, Ladies and Gentlemen of the Jury, have you agreed upon a verdict?

THE FOREMAN: We have.

THE CLERK: How do you find the defendant, Guilty or Not Guilty?

THE FOREMAN: We find the defendant Guilty.

THE CLERK: Ladies and Gentlemen of the Jury, as the Court has received your verdict, you say you find the defendant Guilty, and so say you all.

MR. CHREIN: May we have the jury polled?

THE COURT: You may be seated, please (addressing Foreman).

Poll the jury.

THE CLERK: Juror No. 1, is that your verdict?

JUROR NO. 1: Yes.

THE CLERK: Juror No. 2, is that your verdict?

JUROR NO. 2: Yes, it is.

THE CLERK: Juror No. 3, is that your verdict?

JUROR NO. 3: Yes.

THE CLERK: Juror No. 4, is that your verdict?

JUROR NO. 4: Yes.

THE CLERK: Juror No. 5, is that your verdict?

JUROR NO. 5: Yes.

THE CLERK: Juror No. 6, is that your verdict?

JUROR NO. 6: Yes.

THE CLERK: Juror No. 7, is that your verdict?

JUROR NO. 7: Yes.

THE CLERK: Juror No. 8, is that your verdict?

JUROR NO. 8: Yes.

THE CLERK: Juror No. 9, is that your verdict?

JUROR NO. 9: Yes.

THE CLERK: Juror No. 10, is that your verdict?

JUROR NO. 10: Yes.

THE CLERK: Juror No. 11, is that your verdict?

JUROR NO. 11: Yes.

THE CLERK: Juror No. 12, is that your verdict?

JUROR NO. 12: Yes.

THE CLERK: Jury polled.

THE COURT: All right, the jury has been polled. It has been found to be unanimous that the defendant is guilty of the count that he has been charged with.

That terminates your service. And I want to thank you very much for being in my courtroom. I am sure that you made your determination to the best of

THE DEFENDANT: Your Honor, I have something I would like to read.

THE COURT: You may read it.

THE DEFENDANT: [illegible], presented with the unique -- of addressing [illegible] most honorable [illegible] judicial [illegible]

[illegible]

of all governments where they have been permitted to think and speak freely. Please, as you hold in my faith -- a delicate rasp with thy -- your Honor's hand, consider not to [illegible] myself personally, an economic gain or [illegible] uniformly or similar -- one of moral [illegible]. I continue a verbal assault and transgress. They are continually and successfully ignored and avoided when possible. Had I not taken any action to circumvent the sexual attack, to my thinking then and now that I would have quite possibly been sodomitely raped. My notion was an offense agitated with a fear and confusion, please do not as I am not -- the rage which I unfortunately felt were the results of the counter-action that became so violently tragic.

"Please note at the time of the offense, the incapacity, although I fully understand there was no legal excuse for the despicable behavior and counterreaction which have convicted me of taking of a [illegible] life. Please, although consider the mitigating circumstances which I had been presented with, the traumatic experience that I have undergone and the -- moral injuries I have paid -- with justice, please consider I had admitted [illegible] -- I was presented with the same circumstances of

prejudice against homosexuals in its own right. I

nature -- the jury system is the servant of the people. Please open your heart, your Honor, to liberalize and expand on the great opinions of the right -- but a government consistent with the heart of its people and its interests, that your Honor might add the restoration of that tranquility for which I humbly petition you. This, your Honor, this is my only hope, that you be pleased to emphasize the earnest endeavor and to perpetuate and endure the right of my mind against the offense -- to help establish something between mind and body, mind and spirit, that it may continue -- I pray that thy Honor will preserve liberty and freedom. It is with heartfelt satisfaction that I have been allowed to address thy Honor before thy judicial system --"

MR. CURTIN: I have nothing further to add, your Honor.

THE COURT: You have nothing further to say, Mr. Hendrix?

THE DEFENDANT: No, sir. Thank you.

THE COURT: Mr. Dawson?

MR. DAWSON: Nothing, your Honor.

THE COURT: The Court then is ready to sentence the defendant. The Court first of all wishes to place upon the record that because of

the nature of the crime itself and the seriousness and gravity of the crime will not give the defendant youth correction treatment, although his age would require the Court to consider such treatment.

As to the sentence to be imposed upon the defendant, this is probably one of the most serious types of crime that a person can commit, of taking a life of an individual, whether it be during an emotional and passionate situation. Whether it be during a deliberate attack without emotion or passion Because of that, of course it must be of necessity, incarceration for a period. So that a person who has committed that type of crime may at least not comport again and commit a similar type crime.

The Court has recognized during the entire trial, the first trial and the second trial, that the question of the attitude of the defendant and the mental attitude of the defendant at the time of the commission of the crime was one of the issues that had to be determined by the jury. The first jury was incapable of doing so. It wasn't a fact whether he knew the nature of the crime, but the condition of his mind at the time.

The second jury did find the defendant guilty as charged.

That being so, this Court must then impose what it believes would be a fair, just and reasonable sentence under the circumstances.

Taking into consideration the defendant, his background, the very, very limited life that he has led, lack of family relationship, mother, father, broken home, numerous things that led up to his situation where it places him before the Court at this time at the mercy of the Court, seriousness of the crime that was committed at a port in Russia, and it is still the allegation that this crime was committed because of an attack to say the least might have been improper and he claims he might have been consummated if he hadn't fought, the Court takes into consideration the continued attack of the person and if he had subdued the person, if that were the fact, and I assume the jury found the same facts that being so, this Court takes into consideration all the factors placed upon the record and finds that every defendant that comes before the Court has some good and that good either by incarceration or otherwise can be brought forth.

He is definitely in need of some type of treatment for his depressive state that he falls into from time to time. Because of that the Court

likewise considers the sentence that it will impose upon him. That being so, I find that this Court has a tremendous latitude in the length of sentence that could be imposed upon this defendant, anywheres from 30 years down to one year. That being so, this Court finds that a fair and reasonable just sentence under the circumstances, considering the taking of the life of an individual, regardless of the circumstances that caused the taking of that life, that this defendant is sentenced to nine years in jail. And that he shall receive treatment for his mental condition and treatment to rehabilitate him.

That is the Court's sentence.

MR. DAWSON: Thank you, your Honor.

MR. CHREIN: Your Honor, inasmuch as there was a verdict at the trial and inasmuch as the defendant was represented as an indigent defendant by the Federal Defenders unit of the Legal Aid Society, the defendant would request the Court to file a notice of appeal.

MR. DAWSON: I have prepared the necessary forms and an affidavit of indigency.

THE COURT: The Court must advise you that you have a right to an appeal from a jury verdict.

If you do not have sufficient funds a lawyer shall be continued to be supplied by the Legal Aid Society and you have a right to appeal in forma pauperis and the minutes, which have already been given to you, shall likewise be afforded for the sentence.

THE DEFENDANT: Your Honor, I wish to thank you very sincerely.

(Whereupon, these proceedings were concluded.)

* * *

CERTIFICATE OF SERVICE

January 14, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Sheila Jenoff